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ABSTRACT

This document presents testimony on S. 103 (a bill to provide that the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies), S. 449 (a bill to provide that tax exemption of certain charitable organizations shall not be construed as the provision of federal assistance), S. 990 (a bill to provide that the Internal Revenue Service may not implement certain proposed rules relating to guidelines for the determination of whether private schools have discriminatory policies until the enactment into law of provisions relating to such guidelines), and S. 995 (a bill to require the secretary of the treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to a private school on the grounds of racial discrimination). (JM)

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TAX-EXEMPT STATUS OF PRIVATE SCHOOLS

U.S. DEPARTMENT OF HEALTH,
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HEARING

BEFORE THE

SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT GENERALLY

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 103, S. 449, S. 990, S. 995

APRIL 27, 1979

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TAX-EXEMPT STATUS OF PRIVATE SCHOOLS

FRIDAY, APRIL 27, 1979

U.S. SENATE,
SUBCOMMITTEE ON TAXATION
AND DEBT MANAGEMENT GENERALLY,
COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 2221, Dirksen Senate Office Building, Hon. Harry F. Byrd, Jr. (chairman of the subcommittee) presiding.

Present: Senators Byrd, Talmadge, and Packwood.

[The press release announcing this hearing and the bills S. 103, S. 449, S. 990, and S. 995 follows:]

[Press Release]

FINANCE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT SETS HEARINGS ON TAX-EXEMPT STATUS OF PRIVATE SCHOOLS

Senator Harry F. Byrd, Jr., Chairman of the Subcommittee on Taxation and Debt Management of the Senate Committee on Finance announced today that the Subcommittee will hold hearings on April 27, 1979 on the tax-exempt status of private schools.

The hearings will begin at 9:30 a.m. in Room 2221 of the Dirksen Senate Office Building.

In August 1978, the Internal Revenue Service proposed new guidelines for determining whether certain private schools practice racial discrimination and thus not qualify for tax-exempt status.

Senator Byrd noted that those guidelines were so widely criticized that the Internal Revenue Service withdrew the guidelines after several days of public hearings that were held in December 1978. The Internal Revenue Service has now issued revised guidelines. This hearing will give the public an opportunity to comment on the new guidelines as well as legislation which has been introduced on this question.

The following Senate bills on this matter have been introduced:

(1) S. 103 (Mr. Hatch and Messrs. Byrd of Virginia, Garn, Goldwater, Hayakawa, Helms, Laxalt, McClure, Stevens, Thurmond, and Tower).—To provide that the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies.

(2) S. 449 (Mr. Hatch).—To amend the Internal Revenue Code of 1954 to provide that the tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be construed as the provisions of Federal assistance.

Witnesses who desire to testify at the hearings should submit a written request to Michael Stern, Staff Director, Committee on Finance, Room 2227 Dirksen Senate Office Building, Washington, D.C. 20510, by no later than the close of business on April 6, 1979.

Legislative Reorganization Act.—Senator Byrd stated that the Legislative Reorganization Act of 1946, as amended, requires all witnesses appearing before the Committees of Congress "to file in advance written statements of their proposed testimony, and to limit their oral presentations to brief summaries of their argument."

Witnesses scheduled to testify should comply with the following rules:

(1) A copy of the statement must be filed by noon the day before the day the witness is scheduled to testify.

(2) All witnesses must include with their written statement a summary of the principal points included in the statement.

(3) The written statements must be typed on letter-size paper (not legal size) and at least 100 copies must be submitted by the close of business the day before the witness is scheduled to testify.

(4) Witnesses are not to read their written statements to the Subcommittee, but are to confine their ten-minute oral presentations to a summary of the points included in the statement.

(5) Not more than ten minutes will be allowed for oral presentation.

Written Testimony.—Senator Byrd stated that the Subcommittee would be pleased to receive written testimony from those persons or organizations who wish to submit statements for the record. Statements submitted for inclusion in the record should be typewritten, not more than 25 double-spaced pages in length and mailed with five (5) copies by May 18, 1979, to Michael Stern, Staff Director, Committee on Finance, Room 2227 Dirksen Senate Office Building, Washington, D.C. 20510.

96TH CONGRESS
1ST SESSION

S. 103

To provide that the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies.

IN THE SENATE OF THE UNITED STATES

JANUARY 18 (legislative day, JANUARY 15), 1979

Mr. HATCH (for himself, Mr. MCCLURE, Mr. LAXALT, Mr. THURMOND, Mr. GOLDWATER, Mr. HELMS, Mr. GARN, Mr. HARRY F. BYRD, JR., Mr. TOWER, Mr. HAYAKAWA, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on Finance

---

A BILL

To provide that the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Save Our Schools Act of 1979".

SEC. 2. (a) That during the period beginning on the date of the enactment of this Act and ending on December 31, 1980, the Secretary of the Treasury or his delegate shall not issue—

(1) in final form the proposed revenue procedure described in subsection (b), and

(2) in proposed or final form any regulation, revenue procedure, revenue ruling, or other guidelines which set forth rules substantially similar to the rules set forth in the proposed revenue procedure described in subsection (b).

(b) For purposes of subsection (a), the proposed revenue procedure described in this subsection is the proposed revenue procedure which was published in the Federal Register of August 22, 1978, and which sets forth guidelines to be used in determining whether educational institutions claiming tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954 are operating on a racially nondiscriminatory basis.

96TH CONGRESS
1ST SESSION

S. 449

To amend the Internal Revenue Code of 1954 to provide that the tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be construed as the provision of Federal assistance.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 22, 1979

Mr. HATCH introduced the following bill, which was read twice and referred to the Committee on Finance

---

A BILL

To amend the Internal Revenue Code of 1954 to provide that the tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be construed as the provision of Federal assistance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Charitable Organizations Preservation Act of 1979".

SEC. 2. (a) Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax on corporations, certain trusts, etc.) is amended by redesignating subsection (j) as subsection (k) and by inserting after subsection (i) the following new subsection:

"(j) EXEMPTION FROM TAX NOT TREATED AS PROVISION OF FEDERAL ASSISTANCE.—Notwithstanding any other law or rule of law—

"(1) the exemption from taxation under this subtitle of any organization described in subsection (c)(3), and

"(2) the allowance of a deduction for a contribution to an organization described in subsection (c)(3),

shall not be construed as the provision of Federal assistance."

(b) The amendment made by subsection (a) shall apply to all taxable years whether such years begin before, on, or after the date of the enactment of this Act.

II

96TH CONGRESS
1ST SESSION

S. 990

To provide that the Internal Revenue Service may not implement certain proposed rules relating to guidelines for the determination of whether private schools have discriminatory policies until the enactment into law of provisions relating to such guidelines.

IN THE SENATE OF THE UNITED STATES

APRIL 24 (legislative day, APRIL 9), 1979

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on Finance

---

A BILL

To provide that the Internal Revenue Service may not implement certain proposed rules relating to guidelines for the determination of whether private schools have discriminatory policies until the enactment into law of provisions relating to such guidelines.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Regulatory Equity for Private Schools Act of 1979".

SEC. 2. (a) That prior to the enactment into law of provisions which relate to guidelines to be used in determining whether educational institutions claiming tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954 are operating on a racially nondiscriminatory basis, the Secretary of the Treasury or his delegate shall not issue—

(1) in final form the proposed revenue procedure described in subsection (b), and

(2) in proposed or final form any regulation, revenue procedure, revenue ruling, or other guidelines which set forth rules substantially similar to the rules set forth in the proposed revenue procedure described in subsection (b).

(b) For purposes of subsection (a), the proposed revenue procedure described in this subsection is the proposed revenue procedure which was published in the Federal Register of August 22, 1978, and which sets forth guidelines to be used in determining whether educational institutions claiming tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954 are operating on a racially nondiscriminatory basis.

II

96th CONGRESS
1st Session

S. 995

To amend the Internal Revenue Code of 1954 to require the Secretary of the Treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to a private school on the grounds of racial discrimination.

IN THE SENATE OF THE UNITED STATES

April 24 (legislative day, April 9), 1979

Mr. Helms (for himself, Mr. Ford, Mr. Schweiker, Mr. Stevens, and Mr. Zorinsky) introduced the following bill; which was read twice and referred to the Committee on Finance

---

A BILL

To amend the Internal Revenue Code of 1954 to require the Secretary of the Treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to a private school on the grounds of racial discrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS; DECLARATION OF CONGRESSIONAL POLICY.

(a) The Congress finds that—

(1) discrimination based on race in the public schools violates the Constitution and Acts of Congress, including title VI of the Civil Rights Act of 1964, and the elimination of discrimination based on race in all educational opportunities is a fundamental national goal;

(2) the Supreme Court has held under the Civil Rights Act of 1866 that a private elementary school may not discriminate on the basis of race in the admission of students, but the Congress has failed to provide guidance as to the tax-exempt status of such schools;

(3) revenue rulings and procedures adopted by the Internal Revenue Service which deny tax-exempt status to private schools that discriminate on the basis of race are not based on a specific statute but rest on broad grounds of fundamental public policy as determined by the Service;

(4) the financial viability of many private schools, including scholarship programs, rests on the assurance that contributions to the school are deductible under the Internal Revenue Code, and any action by the Internal Revenue Service affecting the tax-exempt status of a school threatens its existence;

(5) revenue rulings and procedures adopted by the Internal Revenue Service have not been sensitive to

private schools which limit, prefer or grant priorities in admissions to students which are members of religious organizations;

(6) many private schools operated by a particular religion or religious association form an integral part in carrying out the religious mission of the affiliated churches or associations in the free exercise of religion by their members;

(7) various Acts of Congress which condition Federal financial assistance to grantees, such as title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, do not apply to organizations simply because they are tax-exempt;

(8) the Congress has provided in title VI of the Civil Rights Act of 1964 that a public elementary and secondary school system is entitled to notice and a full evidentiary hearing on allegations of racial discrimination including the right to appeal an adverse decision to the Federal courts, prior to the termination of Federal funds; and

(9) neither the Congress nor the Internal Revenue Service has provided for impartial adjudication of allegations of racial discrimination prior to withdrawal of the advance notice of deductibility with respect to con-

tributions to, and the determination of the tax-exempt status of, a private school.

(b) Therefore, the Congress determines that a private school which in fact racially discriminates as to students should not be entitled to tax-exempt status, and contributions to such schools should not be deductible under the Internal Revenue Code of 1954, and further determines that the Secretary of the Treasury should be required to bring a declaratory action in the Federal courts to adjudicate whether a private school in fact racially discriminates as to students prior to any action which affects the tax-exempt status of, or deductibility of contributions to, such school.

SEC. 2. SHORT TITLE.

This Act may be cited as the "Private School Non-Discrimination and Due Process Act of 1979".

SEC. 3. DECLARATORY JUDGMENT PROCEDURE ESTABLISHED.

(a) IN GENERAL.—Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to civil actions by the United States) is amended by redesignating section 7408 as 7409, and by inserting after section 7407 the following new section:

"SEC. 7408. ACTION TO REVOKE OR DENY TAX-EXEMPT STATUS OF PRIVATE SCHOOL ON BASIS OF RACIAL DISCRIMINATION.

"(a) GENERAL RULE.—The Secretary may not—

"(1) revoke or change the qualification or classification of a private school as an organization described in section 501(c)(3) which is exempt from taxation under section 501(a),

"(2) deny, withhold approval of, the initial qualification or classification of a private school as such an organization, or

"(3) condition acceptance or approval of an application for qualification or classification of a private school as such an organization, or

"(4) revoke the advance assurance of deductibility issued to a private school,

on the grounds that the school discriminates on the basis of race as to students unless a court of the United States, in a civil action for a declaratory judgment brought by the Secretary in accordance with the provisions of this section, has found that the school has a racially discriminatory policy as to students.

"(b) PROCEDURE TO BE FOLLOWED BY THE SECRETARY.—Whenever the Secretary has reason to believe that a private school has a racially discriminatory policy as to students, the Secretary shall file a civil action for a declaratory judgment in the United States district court for the district in which the private school is located.

"(c) LIMITATIONS.—

"(1) EVIDENTIARY STANDARD.—No finding that a private school has a racially discriminatory policy as to students shall be made unless the Secretary, by a clear and convincing preponderance of the evidence, shows that the school has had a practice of deliberate and intentional racial discrimination in fact.

"(2) NO ADVERSE ACTION UNTIL SCHOOL HAS EXHAUSTED APPEALS.—In the case of a private school with respect to which a court has found under subsection (a) that it has a racially discriminatory policy as to students, the Secretary shall not take any action with respect to the initial qualification or continued qualification of the school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2)(B) until the school has exhausted all appeals from the final order of the district court in the declaratory judgment action brought under this section.

"(d) RETENTION OF JURISDICTION; REINSTATEMENT OF STATUS.—The district court before which an action is brought under this section which resulted in the denial of initial qualification or revocation of qualification of a private school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a), or as an organization described in section 170(c)(2)(B), shall retain jurisdiction of such case, and shall, upon a determination that such school—

"(1) has not had a racially discriminatory policy as to students for a period of not less than a full school year since such denial or revocation became final, and

"(2) does not have a racially discriminatory policy as to students,

shall issue an order to such effect and vitiate such denial or revocation. Such an order may be appealed by the Secretary, but, unless vacated, be binding on the Secretary with respect to such qualification.

"(e) AWARD OF COST AND FEES TO PREVAILING SCHOOL.—In any civil action brought under this section, the prevailing party, unless the prevailing party is the Secretary, may be awarded a judgment of costs and attorney's fees in such action.

"(f) DEFINITIONS.—For purposes of this section—

"(1) PRIVATE SCHOOL.—The term 'private school' means any privately-operated school which meets the requirements of State law relating to compulsory school attendance other than a school offering care or instruction for students solely below the first grade, nursery schools, schools for the blind or deaf, or schools operated solely for the handicapped or emotionally disturbed.

"(2) RACIALLY DISCRIMINATORY POLICY AS TO STUDENTS.—The term 'racially discriminatory policy as to students' means that a school does not admit students of all races to all the rights, privileges, programs, and activities generally accorded to or made available to students at that school, and that the school discriminates on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, athletic program, or other school-administered programs. Such term does not include an admissions policy of a school which limits, or grants preferences or priorities to, its students to members of a particular religious organization or belief and does not include any policy or program of a school which is limited to, or required of, members of a particular religious organization or belief

"(g) SECTION TO APPLY ONLY TO SCHOOLS WITH PUBLICLY NOUNCED POLICY OF NONDISCRIMINATION.—Subsection (a) shall not apply with respect to any private school unless that school has adopted a policy of nondiscrimination on the basis of race as to students and has published, in such manner as the Secretary may require, public notice of that policy.".

(b) The table of sections for such subchapter is amended by striking out the last item and inserting in lieu thereof the following:

"Sec. 7408. Action to revoke or deny tax-exempt status of private school on basis of racial discrimination.
"Sec. 7409. Cross references.".

SEC. 4. EFFECTIVE DATE.

The amendments made by section 3 of this Act shall apply to actions of the Secretary of the Treasury taken with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code, or which is described in section 170(c)(2)(B) of such Code, after the date of enactment of this Act.

Senator **Byrd**. The hour of 9:30 having arrived, the meeting will come to order.

In the early days of this Nation, a fellow Virginian, John Marshall, writing as a Chief Justice of the U.S. Supreme Court, stated: "The power to tax is the power to destroy."

This statement should be kept in mind in examining revenue procedures which the Internal Revenue Service has proposed to govern tax-exempt status for private elementary and secondary schools.

The proposed revenue procedure was first published in August of 1978 and, due to a storm of protest from the private school community, constitutional lawyers and concerned citizens, was revised in February of 1979.

The impact on education, particularly private schools, of the procedure as it now stands will be enormous.

One of the great strengths of our Nation is its diversity. People of diverse ethnic origins, religions, and a diversity of ideas and thought contribute to the richness of our society.

In education there is no State monopoly over the minds of our young people. Public and private schools work side by side in providing a diverse and enriching array of alternative forms of education.

Those who support the private school system are willing to pay to do so. They pay in addition to the taxes which are collected for public schools.

The IRS regulations pose a threat to this diversity. They will have a chilling effect on private education of all kinds.

The tax-exempt status for private schools permits donors to make deductible donations to the school. Without this exempt status, many schools will lose the funding necessary for them to survive.

The IRS's involvement in determining appropriate guidelines for the racial composition of a private school's student body is puzzling.

The Internal Revenue Service is responsible for collecting taxes and providing revenues for the Federal Government. Yet, the issue before us is not a tax issue. Little tax revenue, if any, is involved.

The goal of providing minorities with equal opportunities in all aspects of life, including education, is laudable.

However, the IRS, in promulgating its regulations, has opened issues which range far beyond the area of educational opportunity.

The regulations bring the heavy hand of big government in an area where there should be little government activity. There is the potential for the IRS becoming a "Super School Board" over private schools, regulating not only their student body but scrutinizing their textbooks, curricula choices, and teaching methods.

Questions of religious freedom are involved since many private schools were formed on deeply religious grounds. Many teach religious doctrines and ideas as an integral part of the curriculum. Many require much greater discipline than would be required under the normal schooling process.

Under the IRS proposal, private schools are presumed to be discriminatory and have the burden of showing that they do not discriminate. Very little latitude is allowed for the facts of each individual school. Instead, schools must show that they meet racial quotas if they are to retain their tax-exempt status.

In establishing arbitrary racial guidelines, which in effect are racial quotas, and declaring that failure to meet these quotas would cause a revocation of tax-exempt status, the IRS is now becoming the arbiter of social and educational values.

The proposed Internal Revenue Service regulations are based upon the philosophy that all income belongs to the government, except for that income which the government decides you can keep. If we accept this premise, it is very easy to say that any activity on which there is no tax is an area which is ripe for government regulation and control. This is a dangerous philosophy.

There is legislation before the committee in regard to the IRS proposed regulations. There are two pieces of legislation, one S. 103 and the other S. 449. Then there is another piece of legislation, S. 995, just recently introduced by Senators Helms, Ford, Schweiker, Stevens, and Zorinsky; and S. 990, introduced by the Senator from Arizona, Mr. DeConcini.

Senator Packwood, do you have a statement this morning?

Senator **Packwood**. I have no statement, Mr. Chairman.

Senator **Byrd**. On behalf of Senator Hatch, who is the chief sponsor of one of the pieces of legislation before this committee, I submit a statement by the Senator from Utah, and statements by Senators Dole and Laxalt.

[The statements of Senators Hatch, Dole, and Laxalt follow:]

STATEMENT OF U.S. SENATOR ORRIN G. HATCH, REPUBLICAN OF UTAH

Mr. Chairman, distinguished members of the Committee, I appreciate the chance to share with you my thoughts on the proposed revenue procedure regarding private religious schools that the Internal Revenue Service is seeking to implement. This is a most important issue because it highlights, in a most serious light, the importance of Congressional oversight of administrative agencies.

Since the first revenue procedure was issued in the Federal Register last August, I have had a tremendous interest in this issue. By its very nature, it entails not only the right of Congressional oversight, but the rights of the American people to freely practice religion and to freely educate their children in whatever moral atmosphere they may choose. Such freedom of choice in religion is one of the cornerstones upon which our republic was founded. We must act to preserve it.

In this light, Mr. Chairman, I might say that the three bills which I have introduced on this subject and which are receiving consideration today seek to address the problem from a variety of approaches. S. 103, the Save our Schools Act of 1979, seeks to postpone the implementation of the IRS regulations to December 31, 1980. Its major purpose was to allow for adequate Congressional examination of these measures—which these hearings have graciously provided.

S. 449, the Charitable Institutions Preservation Act, seeks to strip the IRS of their dubious legal authority concerning the tax exemption for private schools and the removal of it under current proposals.

The Private Schools Preservation Act of 1979, seeks to prohibit the IRS from implementing certain revenue procedures, per se, which seeks to alter the tax exemption of private religious schools without specific Congressional mandate.

Respectfully, I urge this Subcommittee to review these bills and after the necessary deliberations, to report them to the full Committee with dispatch.

Mr. Chairman, the Internal Revenue Service is seeking to promulgate a revenue procedure which assumes all religious schools as prima facie discriminatory and, hence, guilty until proven innocent. There are several things wrong with this proposed revenue procedure, primary among which are the following:

1. A total disregard for the Constitutional responsibility of elected representatives of the people, to whom are delegated the sole ability to legislate social policy.
2. A centralization of social policy decision making in the bureaucracy and away from local authorities and parents who are better informed and equipped to make decisions regarding the education of their young.

3. An abridgement of the rights of religious groups to freely practice their beliefs without interference from the federal government, and,

4. An implicit attack upon organized religion by a secular federal establishment.

The practical effect of these regulations is to revoke the tax-exemption of private religious schools. By implementing such a procedure, funding for these schools will effectively "dry-up." The loss America would suffer from the disappearance of private religious education is incalculable.

To expand on these thoughts, I would say that it is a real threat to our constitutional form of government to allow an administrative agency to set social policy—as the IRS is attempting to do with these regulations.

Indeed, in reading these regulations, one can almost hear Mr. Justice Blackmun in his dissent in ALEXANDER v. AMERICANS UNITED, INC., 94 S. Ct. 2065 (1974), in which he warned of the potential for abuse of power vested in the IRS: ". . . there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time . . . but applications of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern . . ."

I believe that Mr. Justice Blackmun is correct. Legislating social policy is the province of the Congress, not the IRS. The proposed revenue procedure undermines the traditional cultural values we have which support a free and democratic republic by blurring the division of powers between the different branches of government.

These regulations serve only to increase federal intervention in education. The Founding Fathers viewed federal power as a necessary evil in the protection of individual liberty. They viewed it suspiciously. This is one of the self-evident assumptions of American federalism, and it is essential to our political heritage. It must never be contorted into what is fast becoming an unlimited grant of power to an unresponsive and unelected bureaucracy. We in the Congress have the power and responsibility to prevent this. We have the power and authority to assure that American democracy is not sacrificed to a regulatory "fiat" in the fact of congressional inaction, and today's hearing chaired by my distinguished colleague, Senator Byrd, is a major step toward the reassertion of congressional authority in educational policy.

A basic constitutional right to the free practice of religion is also endangered by these regulations. By imposing upon church-run schools, the Internal Revenue Service attempts to dictate the internal policy of these schools, and hence, of churches and synagogues on matters pertaining to enrollment, employment, recruitment and other private rights.

Some would claim that the IRS' proposed regulations in question do not amount to "substantial entanglement" with the Constitutional free exercise of religion. They would hold that the IRS proposed tax directives for private schools amount not to substantive, but to procedural action. But as Chief Justice John Marshall once said, "The power to tax involves the power to destroy." We must not let a regulatory agency, even if for the best of reasons, accomplish the worst of effects. We must do the job we were elected to do by using whatever legislative avenues are necessary to preserve and protect the integrity of our nation's private schools and charitable organizations.

Thank you.

OPENING STATEMENT OF SENATOR DOLE

Mr. Chairman, few, if any, IRS regulations have provoked more deep-felt public concern than the proposed IRS revenue procedure for determining whether certain private schools have racially discriminated in their student admissions and are therefore ineligible for tax-exempt status. After the first version of this revenue procedure was announced last August, more than 100,000 critical comments were submitted to the IRS. Moreover, few IRS regulations have raised more fundamental constitutional and policy conflicts that must be resolved. Thus, I commend the chairman for calling these hearings today so that the committee can address the serious issues raised by the proposed revenue procedure and the four bills that have been introduced in response to that IRS proposal.

Mr. Chairman, racial discrimination in any form is abhorrent and contravenes the public policy repeatedly reaffirmed by Congress in numerous civil rights measures. The courts have clearly held that a private school which engages in intentional racial discrimination in its student admissions policies is not entitled to Federal tax-exempt status. Nevertheless, there is considerable doubt whether the IRS proposal examined here today is the best, or even an appropriate response to this problem.

One of the most troublesome questions about the proposed revenue procedure is whether it conflicts in any way with the first amendment guarantees of religious freedom. Pursuant to a policy announced in 1975, the IRS intends to apply the proposed procedure to church-affiliated and religious schools as well as private secular schools. Many opponents contend that the revenue procedure is fatally defective because it entails an excessive government intrusion into the establishment and free exercise of religion. Obviously, many religious schools have few or no minority students precisely because the religious groups sponsoring the schools, for reasons unrelated to racial discrimination, have few minority members. We must be careful to insure that the zeal to eliminate racial discrimination does not result in any infringement on religious freedom.

There are a number of other concerns about the IRS proposal. For example, some have asserted that the twenty percent "safe harbor" test is nothing more than an arbitrary race-conscious quota, similar to that which was condemned by the supreme court in its recent *Bakke* decision. There has also been some apprehension that this proposal will destroy or injure private education by excessive government regulation. In addition, the proposal raises questions about the proper function of the IRS since it tends to sink the service more deeply into the business of civil rights enforcement. Many believe that the IRS should not divert its manpower and resources away from its central mission which is the collection of taxes.

Finally, many groups strongly believe that the IRS has overstepped its statutory and constitutional authority in formulating the proposed revenue procedure. Obviously, the IRS has developed this far-reaching and controversial revenue procedure without any guidance from Congress. Some argue that sensitive policy judgments of this sort should be left to elected representatives.

Mr. Chairman, I hope these hearings will shed light on these important questions.

STATEMENT SUBMITTED BY SENATOR PAUL LAXALT

Mr. Chairman, I am pleased that this committee is conducting hearings on the IRS' proposed procedures relating to the tax-exempt status of private schools. I firmly believe that this is an issue that must be fully explored and monitored by Congress. This is necessary because the IRS' actions in this area pose a threat not only to the parents, teachers and students affiliated with private schools but to every American concerned with the individual liberties outlined in the First Amendment.

As a member of the Senate, an additional area of concern to me is the usurpation of legislative power that the IRS' incursion represents. The IRS is issuing a policy statement which has the effect of statutory law. The question we all need to ask ourselves is, who do we want making our laws, bureaucrats or elected representatives?

The first educational institutions established in colonial America were under religious sponsorship. The schools continued to grow and flourish even when faced with the full establishment of a taxpayer-supported, free public education movement in the 19th century. Religious groups such as the Catholics and the Lutherans established large school systems especially in urban areas. In recent years, there has been a great growth in private schools, especially individual Christian and Jewish schools. While some of the large public school systems have had to close and consolidate schools, private educational institutions throughout the country have managed to overcome great difficulties including increasing expenses, recruitment of students, school personnel, and teachers. The growth of private education in the United States has resulted from a number of factors including a dissatisfaction with the quality of education provided in public schools, a concern with the growing secularization of public education, and a view that religious educational institutions are part of an extension of the work of religion and religious people.

This right to the free exercise of religion is one that has historically been guarded by our Constitution and courts. The vast majority of private schools to be affected by IRS' proposed procedures are church related or religious schools. It is too easy to lose sight of the fact that this issue involves the rights of two groups of minorities, one which is ethnic and the other religious in character. Both groups have important constitutional rights which must be respected. Mr. Chairman, in my opinion the present difficulties with the IRS procedures point to the problems which arise when an administrative agency without authorization or guidance from Congress attempts to take it upon itself to resolve such sensitive issues.

This new procedure would require private and religious schools to justify their enrollment, hiring, and curriculum policies to the IRS or forfeit their tax exemption. I am unaware of any Congressional mandate giving IRS authority to regulate these matters in private schools. Furthermore, the IRS procedure leaves the final determination of whether a private school is following "public policy" up to the IRS Commissioner, giving him the power of an "education czar" over private educational institutions. We must not lose sight of the fact that the IRS function is to collect revenue not regulate education.

I wish to emphasize that I do not support any efforts that promote racial discrimination in employment, education, or any other activity. However, it is my opinion that the ugly spectre of racism has been used as a smokescreen for this usurpation of legislative authority by the IRS.

In conclusion, I want to commend this committee for taking the initiative to explore this important area because it is the responsibility of Congress to closely examine the questions presented by this issue. If a new national policy is to be set on this matter, then it is the lawmaking body, not the bureaucracy, which must act.

Senator BYRD. The first witness today will be the distinguished Senator from Iowa, Mr. Jepsen.

Senator Jepsen, the committee is pleased to have you today, and you may proceed as you wish.

STATEMENT OF SENATOR ROGER JEPSEN

Senator JEPSEN. Mr. Chairman, the IRS has proposed a revenue procedure that would deny tax-exempt status to those private schools that cannot prove to the liking of the IRS that they have not discriminated against minorities—whether or not there is any proven intention of discrimination. As the newly elected junior Senator from Iowa, it is my humble opinion that if we allow the Internal Revenue Service to implement their proposed revenue procedure on private tax-exempt schools, we will have failed to perform our duties as popularly elected legislators.

Throughout my campaign for the U.S. Senate, the one pervasive theme impressed upon me by the people of my State was that somehow this Congress just has to get a handle on the insensitive Federal bureaucracy no one elected and which is seemingly, in their eyes anyway, responsible to no one.

Their never ending pleas for help have for the most part been ignored. The Federal bureaucracy over the years has expanded tremendously in size, in power, and in arrogance. Federal bureaucrats have become a mandarin class, and this country has steadily transformed itself into a mandarin state.

This characterization is only an attempt by me to explain to myself how it is that nonelected officers have come by the power to decree that father-son banquets and all male elementary school choirs are no longer acceptable practices. It suggests to me, however, that if we, as duly elected legislators, are ever to regain the confidence of the people who sent us here, we must reaffirm our role as final arbiters of policy making in this country.

With this in mind, I would just like to add that in this particular instance, I believe that there is no room for compromise. The IRS' proposed regulations do not need to be revised, they need to die a sudden death, followed by a speedy but permanent burial.

The primary target of this revenue procedure is no secret. In the wake of public school integration, private, so-called segregation academies prospered in this country. Most of the estimated 3,500 such schools are in the South, but by no means are they limited to that region.

These schools are generally regarded with disfavor in the courts and in public opinion, and to the extent that they foster racial segregation at the expense of educational achievement, it is unlikely that very many people would object too strenuously to the IRS' proposed attack. Not unexpectedly, however, the Federal bureaucracy's quixotic efforts to eliminate some form of social injustice has entangled them in more fundamental and significant questions as to the proper role of the Federal governing body in relation to the individuals who are to be governed.

Reasons for objecting to the IRS' new revenue procedure are not to hard to come by. There is some concern that the guidelines may exceed the Services authority to determine the requirements for exempt status. Whether one approaches this threshold question on the basis of statutory construction or constitutional limitations, the answer, at the very least, is still open to debate.

The lack of a clear cut answer by the Supreme Court on this subject and the opinions of the Justice Department in a brief filed on May 10, 1977 on behalf of the IRS in the *Wright* v. *Blumenthal* case, which argues persuasively that the legality of such regulations was extremely doubtful should though, be cause enough for the IRS to withdraw their proposed procedure.

But for the sake of argument let's say that they do have the authority to issue these guidelines. What is it about these proposed regulations that strikes such a fear into the hearts of the governed? It seems that in its attempt to eliminate the enemies of integration, the IRS has spread a net so wide and so far that the very notion of a distinction between private and Government as we understand it today is threatened with extinction.

This may sound a bit dramatic but it is not far from the truth. The revenue procedure defines two classes of schools; those adjudicated to be discriminatory, and those that are reviewable. Reviewable schools are those, (a) which were formed or substantially expanded at the time of public schools desegration at their community; (b) which do not have significant minority enrollment; and (c) whose creation or substantial expansion was related in fact to public school desegregation in the community. They are also presumed to be discriminating unless they have undertaken actions or programs to attract minority students on a continuing basis.

These proposals, clearly constitute a back-door attempt to impose affirmative action programs on heretofore private schools, and if the IRS succeeds in establishing this precedent, on other privately operated institutions and organizations. In short, they amount to nothing less than indictment by computer and will undoubtedly discourage the creation of other private entities.

One of the most cherished and respected principles of American jurisprudence is that one is presumed innocent until proven guilty. The IRS guidelines, however, turn this principle on its head, and instead, in their application to reviewable schools, establish an administrative presumption of illegality based upon a statistical deviation from a racial or ethnic norm conjured up by HEW. This fact alone is so repugnant to the basic American notion of fair play that the guidelines should fall to the ground and like Humpty Dumpty, never again to be put back together.

But there is other respected authority available which allows us to reach a similar conclusion—the Supreme Court decision last year in *University of California Regents* v. *Bakke*. In its opinion the Court admonished us all not to impose racial goals, quotas, or other forms of race conscious relief in the absence of specific findings of past discrimination by the courts, Congress, or competent administrative tribunals. The basic thesis of the opinion was that racial or ethnic distinctions of any sort are inherently suspect and lacking a finding of identified discrimination there is no compelling interest that can withstand constitutional objection.

Thus, it seems clear to me that the numerical standards employed in the IRS' guidelines are of dubious validity, especially in light of an absence of any showing of a racially discriminatory purpose. It would behoove the IRS to take notice of the fact that many factors, other than an intent to discriminate, might account for a given school's establishment or expansion at a time of desegregation such as an already existent general dissatisfaction with the quality of public education, the banning of voluntary prayer in public schools, an availability of funds for private school expansion, or a need for such expansion because of community growth.

In addition, the fact that upon its establishment or expansion and afterwards, a private school has an insubstantial minority enrollment can be accounted for on many grounds other than an intent to discriminate.

You know, as long as I can remember, there has been a consensus in this country that there are certain limits beyond which the power and the scope of the Federal Government could not extend. One aspect of this is the belief that the church and the home are areas in which the Federal Government could not intrude. No longer, it appears, because the IRS procedure specifically states that the requirement that a school must have a racially nondiscriminatory policy as to students in order to qualify as an organization exempt from Federal income tax also applies to church-related activities and church-operated schools.

As I alluded to earlier in my remarks, that the IRS even has the authority to implement the procedure is dubious indeed. Its claim rests on the tenuous assumption that the Government assists tax-exempt schools with money it does not collect by virtue of exemptions, that is, it bestows some sort of positive benefit. Aside from the fact that taxation in this instance has probably never before been contemplated, the attitude of the IRS reflects an increasing tendency on the part of certain agencies and departments of the Federal Government to regard tax exemption as a privilege—a privilege to be enjoyed on the Government's terms.

This, then to paraphrase a recent Washington Star editorial, is the vehicle by which the Federal Government can expand its already vast powers to compel others to conform to notions of social good proclaimed in Washington, not just as to race but as to other matters as well—the assumption that, whatever private activity the IRS now does not tax, it, in effect, refrains from taxing. It is customary for the bureaucrats to deny the logical extremes to which their original ideas point, but anyone who has followed the growth of the Federal Government over the past two decades recognizes that those extremes somehow manage to appear as next year's policy initiatives.

The IRS' proposed procedure raises the very real possibility that the taxation of churches and church-related activities might become rather commonplace in the future. This prospect is quite discomforting to say the least.

Firmly entrenched in this Nation is the notion of separation of church and state. The first amendment to the Constitution is symbolic of our commitment as a people to this practice. Further evidence of this commitment is the fact that the civil rights statutes themselves specifically exempt from coverage churches and church-related activities.

When first amendment and 14th amendment rights conflict especially in the area of tax exemption, the law and the courts have come down on the side of those seeking protection under the first amendment on the grounds that State involvement stemming from tax exemption amounted to no more than expression of a governmental policy of benevolent neutrality towards religion.

At stake here, Mr. Chairman, is a very important principle. If we allow the IRS to impose numerical goals and affirmative action programs on private schools as a condition of maintaining their tax-exempt status a precedent will have been set—a dangerous precedent at that. Once the lines drawn today are breached, where will the new lines be drawn?

It is not hard to conjure up the spectre of the IRS deciding to meddle in the affairs not just of schools, but of virtually every kind of tax-exempt organization in the years to come in an attempt to exact compliance with freshly formulated notions of social or racial democracy. Private charities, scholarly institutions, hospitals, museums, and certain clubs all could be affected. And as I have suggested in this presentation—not even churches would be beyond the agency's reach.

I mentioned earlier in my remarks that Congress would be remiss if it did not take appropriate action in this instance. It is imperative that we as legislators regain the respect of those who sent us here. Congress is ultimately responsible for the laws that it passes, and we cannot pass the buck. The Federal bureaucracy is a juggernaut out of control. It is time for us to tame it once and for all.

Senator **Byrd**. Thank you, Senator Jepsen.

Senator Packwood?

Senator **Packwood**. I have no questions. It was a good statement.

Senator **Byrd**. Senator Talmadge?

Senator **Talmadge**. I compliment you on your statement, Senator Jepsen.

Senator **Jepsen**. Thank you, Senator. It is always a privilege to appear before the distinguished chairman of the subcommittee.

Senator **Byrd**. We are delighted to have you here today, Senator Jepsen. Thank you for your testimony.

The next witness is Congressman Robert K. Dornan of the State of California. Congressman, we are glad to have you before the committee today. You are most welcome, and you may proceed as you wish.

STATEMENT OF HON. ROBERT K. DORNAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative **Dornan**. Thank you, Mr. Chairman. It is an honor to be here today and good morning to the other distinguished Senators on the panel; I would like to say I appreciate very much that the distinguished Director of the IRS, Mr. Jerome Kurtz, is here also this morning and I hope he will take careful note of my remarks.

My staff has worked on this for many, many months and I deliver my testimony this morning with all the power of conviction that I have ever felt on any issue in my 46 years.

I would like to take this opportunity to thank you and the other distinguished members of the Subcommittee on Taxation for inviting me, from the other body, to testify on the IRS's proposed rulings relating to private schools. Because of the breadth and the complexity of the issues involved, as well as the constraints on time for testimony, what I shall do, Mr. Chairman, is just read a summary of my statement. But I will provide to all the members of the subcommittee, as well as any other interested parties, the full text of my testimony.

Senator BYRD. Yes, Congressman. The text of your testimony will be published in full.

Representative DORNAN. Thank you.

Mr. Chairman, the core of this controversy between the IRS and the Members of Congress opposed to the proposed rulings centers around a twofold assumption on the part of the IRS: one, that tax exemption is a form of Federal assistance, that is, subsidies, and hence can be used as a sanction against these charitable institutions which do not conform to "public policy". Two, that public policy is to be interpreted by the IRS rather than by Congress, notwithstanding our republican form of government. Mr. Chairman, I challenge both those assumptions.

Implicit in the first assumption, that tax exemption is a form of Federal assistance or subsidy, is that nontaxation of voluntary associations under 501(c)(3) of the IRS code is somehow an abnormal condition, that the Government has the right and the duty to tax everything that lives and moves and has being. Anything that escapes taxation, according to this logic, is therefore conceived to be enjoying some kind of special privilege or immunity at the expense of the rest of society.

I submit, Mr. Chairman, that such an assumption is totalitarian in nature and at variance with our entire Anglo-Saxon tradition which holds to the proposition that the state is made for man, not man for the state.

The justification for exempting charitable organizations is twofold. First, of practical consideration, taking into account the nature and the purpose of tax exemption as well as original legislative intent and second, the philosophical consideration which recognizes the vital role of voluntary organizations in a democratic society.

The practical justification for exempting charitable organizations from Federal taxation is a recognition of the fact that they are nonprofit, nonwealth producing entities. As Professors Bittker and Rahdert of Yale University point out:

> The exemption of nonprofit organizations from federal income taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit.

Professors Bittker and Rahdert go on to point out that when Congress wrote the first modern income tax statutes, the Revenue Act of 1894 and the Revenue Act of 1913, only "net income" was to be taxed, thus excluding all nonprofit organizations which have no "net income". And the Supreme Court in the case of *Commissioner* v. *Teiler* emphatically stated:

> We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly embedded in the tax statute from the beginning.

To put the matter somewhat differently, Mr. Chairman, the purpose of charitable organizations is not to generate wealth; it is, rather, to pursue common needs and shared interests which more often than not redound to the benefit of the community. To tax nonprofit organizations would be pointless since they are not producers of monetary wealth. Moreover, and most importantly, the tax-exempt status of nonprofit organizations is not an injustice towards the rest of society in the form of an added tax burden. On the contrary, each of the members of such associations already pays his or her share of taxes. It would, in fact, be "double taxation" if members of nonprofit organizations were to be taxed again for the time, effort and money contributed to activities from which they derive no monetary gain.

Such "double taxation" would, indeed, work to discourage the founding of nonprofit organizations as the Supreme Court case of *Walz* v. *The Tax Commission of the City of New York in 1970* has clearly shown.

Mr. Chairman, at this point, it is of utmost importance to stress the operational distinctions between a tax exemption and a subsidy.

One, in a tax exemption, no money changes hands between Government and the organization.

Two, a tax exemption, in and of itself, does not provide one cent to an organization. Without contributions from its supporters, it has nothing to spend.

Government cannot create or sustain by tax exemption any organization which does not attract contributions on its own merits.

Three, the amount of a subsidy is determined by a legislature or an administrator; there is no "amount" involved in a tax exemption because it is open-ended. The organization's income is dependent solely on the generosity of its several contributors.

Four, consequently there is no periodic legislative or administrative struggle to obtain, renew, maintain or increase the amount, as would be the case with a subsidy.

Five, a subsidy is not voluntary in the same sense that tax contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient.

Six, the tax exemption does not convert the organization into an agency of "state action," whereas a subsidy in certain circumstances may do just that.

Parenthetically, I might add that the assumption that tax exemption, Federal assistance, and Federal subsidies are synonymous is troublesome for another reason. Recently, tax-exempt status has been granted for organizations sympathetic toward such practices as witchcraft, homosexuality and abortion. I have that list later if you want to refer to it. Are we, in effect, subsidizing such groups, while questioning the legitimate and integral function of church-related schools, and do we really believe that there will be minority requirements based on race for organizations oriented toward gay rights, witchcraft and abortion?

We come now, Mr. Chairman, to the philosophical and, ultimately, more fundamental justification for the tax exemption of charitable institutions: the role of voluntary associations in a democratic society.

The rich associational life of the United States, Mr. Chairman, provides a vehicle through which individuals may voluntarily participate to attain objectives which neither government nor business is attaining nor perhaps can attain. Voluntary organizations give to democracy its vigor and dynamism. They provide the basis for resisting an oppressive government and correcting its excesses.

As Justice Brennan stated in his concurring opinion in the Walz case I cited previously:

> Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they, among the range of other private, nonprofit organizations, contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation or left undone, to the detriment of the community.
>
> Secondly government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint and enterprise essential to a vigorous, pluralistic society.

Finally, Mr. Chairman, I indicated earlier that the core of the controversy between the IRS and the Members of Congress involves not only the assumption that tax exemption, Federal assistance, and Federal subsidies are one and the same thing, but that tax exemption would be subject to revocation by the IRS if the practices of organizations falling under 501(c)(3) were not in accord with "public policy" as interpreted by the IRS.

The most devastating critique of such an untenable assumption is to be found in the recent Federal district court case, December 27, 1978, just last year, of *Bob Jones University* v. *United States of America*. I respectfully urge all members of this subcommittee to carefully read and reflect upon this singular opinion issued by Judge Robert F. Chapman. I have time to cite only a few pertinent passages.

With regard to the intent of congressional legislation vis-a-vis section 501(c)(3), Judge Chapman notes the following:

> The Defendant [in this case, the United States government], acknowledges that the limitation which it has attached to 501(c)(3), that an organization qualifying under one or more of the listed exempt purposes may be denied exemption if its practices violate public policy, has no support in the language of the section. The construction which the IRS has placed on 501(c)(3) troubles this court.

Judge Chapman continues his incisive analysis, Mr. Chairman, by focusing on the concept of "public policy". I quote Judge Chapman:

> Federal public policy is constantly changing. When can something be said to become federal policy? Who decides? With a change of federal public policy, the law would change without congressional action, a dilemma of constitutional proportions. Citizens could no longer rely on the law of 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny.

Finally, the Judge argues conclusively and to the point when he says:

> In enforcing a construction of the statute which is unwarranted by its legislative history or express terms, the IRS has overstepped its authority and usurped the power of Congress.

My testimony, Mr. Chairman, has been in light of the bill that I have introduced on the House side, H.R. 1002, which amends the Internal Revenue Code of 1954 to provide that the tax exemption of charitable organizations under 501(c)(3) and the allowance of a deduction for contributions to such organizations shall not be construed as the provision of Federal assistance. This is to make original legislative intent in this matter unequivocally clear.

The issue at hand is clear, Mr. Chairman: In a republican form of government, is Congress or the unelected IRS going to make our Federal tax laws? I hope my testimony has been helpful in answering that question unequivocally and I would like to close with an epilog here from a book that we procured from the Library of Congress just yesterday, "The Law of Tax Exempt Organizations," which I believe, in one specific paragraph, Mr. Chairman and distinguished members of this committee, gives us an indication of the pressure on our IRS, as to why they would venture forth into this very dangerous area.

It simply says on page 22, again of this book, "The Law of Tax Exempt Organizations," by Hopkins:

> The pressure on tax exemptions is severe, though the charitable contribution deduction is being subjected to an even greater barrage. The reasons for this stem largely from the need of our government at all levels for additional revenues. Tax exemption shrinks the tax base, forcing the remaining taxpayers to bear an increasing burden as the demand for tax revenue rises.
>
> This is most vividly demonstrated in metropolitan centers where acres of valuable land owned by government, churches and the like escape property taxation, forcing taxation at higher rates on adjoining parcels.

Yesterday, Mr. Chairman, or the day before yesterday, on the House side we voted for the 100th time. This will be on April 25.

Last year, on that same date, April 25, we had voted 252 times, going for an alltime record in the other body in October of 962 record votes and quorum calls. There has been a distinct change in this year.

Some columnists and editorialists have called it a do-nothing Congress in both bodies. I reject that, and I resent it, because what has happened is a much more reflective look at the 96th Congress, at exactly what the U.S. citizenry wants us to do, how much they want us to get into their lives, deeply into regulating their moves and facets of American life, and I think what we have now in the 96th Congress is more reflective of Congress spirit; the spirit of '76 has spread from my State, California, all the way across the Potomac.

What we are doing now, and I hope Mr. Kurtz is aware of this, is taking a good, long, hard look at why he has been under such pressure to raise more and more revenue every single year as though it were a runaway freight train for the last 40 years or so, and I think that this example of getting down to taxing private schools and churches and institutions as a way of getting more and more revenue is a burden we are going to relieve Mr. Kurtz of by a less demand for taxation.

What I would like to do is point to an American citizen who wrote in 1968, with great precision and skill, that same Mr. Jerome Kurtz, because I really find, sir, that I enjoy vintage Kurtz to a great degree. These are the remarks of Mr. Kurtz at the University of Southern California Law Center, on major tax planning for 1968 a decade ago, and I quote the distinguished Jerome Kurtz:

> However, it is becoming increasingly clear as more careful attention and study are given to the various tax proposals at hand, that while there are some things that the tax system can do extremely well and efficiently, it can only do poorly and inefficiently most of the taxes that are being proposed for.

Further on, he says:

> If all of the proposals encourage worthwhile social activity through the tax system were adopted, the tax system would be left a shambles, incapable of performing its primary function of financing government equitably and with healthy economic growth.

Later on, he says:

> I would conclude, therefore, that while the tax system may be able to solve some problems, one seeking this route should have a high burden of proof to show that the tax system is the most efficient way of accomplishing the goal.

And then in a later paragraph, Mr. Kurtz says:

> If one begins with the assumption that the basic purpose of the tax system is to raise revenue in a way that is consistent with general economic growth and prosperity rather than assuming that it is a system designed to cure social problems, one would approach the housing problem from the expenditure side of the budget.

I might add that he might include any other problem in our society, from our lowest raises and merits to all good Americans. I find lots of areas and opportunities for social progress in our school system, but I think that it is the hidden pressure of busing, of some sort of mechanistic solution to some of the problems that beset us in our schools that has created a pressure across this country that affects even Mr. Kurtz's feelings, then I would suggest that the Congress can find ways to alleviate this busing pressure and other social pressures on the good citizens and IRS, but going after private institutions is certainly not the way to do it.

Thank you, Mr. Chairman. I am open for your, or other members' questioning.

Senator BYRD. Thank you.

You have made a careful and detailed study of this matter before the committee today.

You mentioned the fact that the House of Representatives this year, as of April 25, had only 100 rollcall votes compared to 252 last year. I want to congratulate the House of Representatives. I think that that is the direction that both the House and the Senate should go in.

In my judgment, one of the great problems with this country is that the Congress of the United States has been trying to pass too many laws. I think that is one reason for the rebellion on the part of the American people. I hope they will continue that rebellion, and I think that the Congress belatedly is beginning to get on the same wavelength with the American people in regard to the need to reduce the multitude of legislation which the Congress has been enacting.

In your testimony, Congressman, you mentioned something about witchcraft. I did not understand exactly what you were referring to. Could you comment on that?

Representative **Dornan**. Yes, sir.

I said, Mr. Chairman, if we wanted to touch on this a bit further, I have a cumulative list of organizations revised to October 31, 1977, from the Internal Revenue Code, that are tax-exempt organizations, and in those organizations—it is quite a large list—are things like the Association of Cymmry Wicca of the Church of Y Tylwyth Teg, Smyrna, Ga. It is a witchcraft group.

There are others here, for encouraging the Sisters of Lesbos, gay rights groups, Gay Community Center, Chillicothe, Ohio; Gay Community Concern Inc, Gay Community Services Center, Los Angeles; Minneapolis, Seattle.

There is a revenue ruling for many, many groups that many of us do not consider in the mainstream of American life. Are we to assume that by recognizing tax-exempt status for these groups that they are, therefore, being federally subsidized or federally encouraged?

Good Lord, I hope not. Yet that is the obvious, commonsense conclusion given the approach that the IRS has taken to considering any tax exemption a government subsidy. Therefore, if there is some social ill in some school, some imbalance of racial structuring, some Jewish school whether there are enough black students present other than Sammy Davis and some other distinguished Americans of the Jewish faith that are not of the Caucasian race, I assume right there you have a problem with Jewish private schools when it comes to racial quotas.

If we look at the current cover of Time magazine and consider the ludicrous point to which the homosexual and lesbian discussion has been carried in this country, as Time puts it, are the most abused minority, then God forbid that the IRS will decide what quota private schools or aggressive program they have to have to make sure all schools have a fair percentage basis of homosexuality of our schools, since, according to Time magazine, 10 percent of our society is homosexually oriented.

Senator **Byrd**. Thank you, Congressman.

Senator Packwood?

Senator **Packwood**. Congressman, I have to leave for a funeral and I want to make a statement before I go. I have been heavily involved in the bill promoting tuition tax credits for private schools and from that comes my concern about the issue that is raised by the Internal Revenue Service in its attempted enforcement.

The greatest protection for all of our civil liberties in this country is diversity, very jealously guarded. I have strong misgivings about a unitary education system, or any other unitary system run by governments teaching a particular orthodoxy and attempting to enforce it on the rest of the country, and that can happen to any government.

It does not happen maliciously in most cases. It just takes whatever the orthodoxy of the day is and writes it into its curriculum or writes it into its government and attempts to enforce it on the rest of us. One is the dangers of prayer in public schools; we might agree with it, but others do not. As a consequence of that, we have attempted to encourage, and I think it is a wise policy, the formation of diverse private schools, whether Catholic, Baptist, or unaffiliated.

At the same time, we try to draw a line that says you cannot racially discriminate in private education. I am discouraged by some of the statements I have seen in the American Civil Liberties Union and others, and I have belonged to that organization for many years and still find that by and large, it does a superior job of protecting the civil liberties of the people in this country. They had to take a very tough stand involving the Nazi parade in Skokie, Ill., and I admire them for their courage. They had to take the stand to protect the rights of members of that repulsive organization.

But, at some stage, if we have to tilt, we are better off to tilt on the side of occasional private abuses which will happen, rather than uniform, public conformity, which is just a short step toward any government saying, we are right and you are wrong. And if you cannot understand that, "we will. . . ." and then it trails off into whatever it might be, the worst being jailing you and executing you.

I talked to Mr. Kurtz in my office the other day about the regulations. I have strong misgivings about them. I am not quite sure yet how to draw the line so that we can have perfect nondiscrimination and perfect nongovernment interference. Maybe there is no such line, but in the last analysis, the greater danger, if you look at the history of Anglo-Saxon history from Magna Carta onward, it is the history, century after century, of attempts to limit government power based upon the practical experience of the abuse of the civil liberties of citizens.

If we must tilt on one side, it ought to be a tilt against assumptions of a correctness on the part of the government.

Representative **Dornan**. Senator, I certainly concur with that excellent statement. There was an expression in Vietnam that some of the men had sewn on to the back of their jackets that "I am going straight to heaven because I have served my hitch in hell," and I am sure that maybe the distinguished director of the IRS may go straight to heaven because his job is similar, I am sure, as serving a hitch in hell.

With all due respect to him, I would lke to ask you to please note in his testimony if he uses the words, "we grant," "we grant," as much as he did before the House committees, and I think it is an interpretation of government and his role with which I respectfully disagree. It is our function in the Congress, in both our distinguished houses, to decide by tax exemptions a citizen's, or group of citizen's right, that they have some area of their monetary reward that is not to be touched by the Federal Government.

It is not some overall State right that all money belongs to the State and that every tax exemption is something that this amorphous government of ours is granting to its citizen. That is a complete reversal of what our forefathers and foremothers have decided, when our country as the greatest experiment in democracy ever in all of recorded history started out.

I hope that even my warning hint beforehand will alert you to this possible, very inherently different and philosophical approach to government the two of us have. But I do recognize the difficult job that he has.

I noticed an article in a magazine where he said he did not think that there was much cheating going on in the income tax of our citizenry. I hope he is correct, but I suspect, just in the last 10 years, a tremendous burden that has been placed on American life, from corporate life down to the individual, lower middle class American, with a tax burden, I think, that we are eroding this wonderful, voluntary approach that Americans had in paying their taxes, and God forbid that we ever get to the French system of cheating where the game is it is us against them and the "them" is the U.S. Government.

In this country, I always thought that we are the Government and that we took great pride in our voluntary approach to supporting our wonderful Government.

Senator **PACKWOOD**. The frustration in attempting to protect the views that you and I share is the other side of it, the zealousness of some private groups in trying to impose their views on the rest of us. They have the right, within the limits of the Constitution to do so, but that can come back to haunt them 25 years hence when some other group manages to impose their views.

I remember speaking to the Women's Political Caucus at an abortion rally; I support public funding of abortion. One of the women rose and asked the question, why do you pursue the issue of tuition tax credits so vehemently when all this is going to do is encourage Catholic schools, which turn around and oppose abortion and attempt to defeat you and attempt to impose upon this country a view that those of us who support abortion do not share?

I responded, if you do not understand why it is important that those schools exist and have that right, then you do not understand the history of civil liberties in this country.

Representative **DORNAN**. Voltaire did not say it any better than you just did, Senator. I might say, also, since the ugly specter of racism is one of the things that I think has misdirected some of our distinguished public servants in this area of using tax credits as the tool of social policy, racism is so ugly that any school that is founded in the name of Jesus Christ that practices this ugly process or uses Christ's teaching as some sort of a smokescreen to establish a racist system of education, they kill themselves from the very genesis of their organization by twisting the teachings of the Prince of Peace. And their own punishment is their own hypocrisy and they fall heavily of their own weight as any crusade in all of history that has killed or turned brother against brother in the name of Christ, or any great leader.

I hope we do not see that happening with the renewal of Islamic holy wars, because those have always turned out to undo themselves, too.

I share everyone's anger in this room at racism as it still persists in this country, but we cannot destroy a constitutional approach to how our Government should influence our lives, no matter what the motivating evil is, that it tempts us to use every tool in the Federal Government to influence positive social policy as a force for good.

Senator Packwood. Thank you, Mr. Chairman. If you will excuse me?

Senator Byrd. Senator Packwood, before you leave, may I say I think your statement a few minutes ago is one of the finest that I have ever heard since I have been in the Senate regarding the need to protect the public from the excesses of government. This is the real basis of our Constitution which was written in great part by so many citizens of the State that I represent.

I want to thank you for your statement and commend you for it.

Senator Packwood. Thank you.

Senator Byrd. Senator Talmadge?

Senator Talmadge. I have no statements, Mr. Chairman. I do want to compliment the witness on his excellent statement.

Senator Byrd. Senator Helms, we are glad to have you here today.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator Helms. Thank you for your characteristic courtesy in inviting me to sit with your distinguished subcommittee.

Senator Byrd. We are glad to have you.

Senator Helms. I, too, was impressed with Senator Packwood's statement. Senator Packwood and I happen to differ very strongly on the abortion question, as he indicated.

Senator Byrd. You are the leader of one side and he is the leader of the other side.

Senator Helms. That is putting it a bit generously as to my role. Nonetheless, we must always keep our options open in this country for expression of divergent opinions, and as the distinguished chairman has so often stated, and fought for, the principle of limited government.

The distinguished chairman hails from Virginia, as did another great Virginian, Thomas Jefferson, who counseled us that the least government is the best government. That is what we are talking about today.

Thank you very much, Mr. Chairman.

Senator Byrd. Thank you, Senator Helms.

Congressman, you gave the committee a great deal of helpful information this morning and we are pleased to have your ideas.

Representative Dornan. Mr. Chairman, may I point out one final aside; I have filled out my own income tax forms, all my life, since I filled out my 1040 at 14 years years of age, 32 years ago; I have taken that burden each year of my life. I have never had an audit until this year. I am looking forward to it, and I am going to have to go 31 years in view of the fact I never had any outside help doing the forms. They have gotten complex because of this filling out the 1040, which Thomas Jefferson has appreciated. It kept me close to the increase of my own tax level.

I did notice that our Federal Government recognizes, on our tax deduction, an area, the removal of any State taxes from our overall burden of taxation. In that State taxation is a large segment or percentage of money that is granted to public schools; therefore, am I to assume if I did not like something about the public school system as Jane Fonda during the Vietnam war, I can start to say I do not want this segment or that segment of taxation going to some or other part of schools. I willingly pay the State taxes. I enjoy taking it out of my Federal level of taxation as a deduction and I believe we should all consider, given this witchcraft area that we discussed, the broad range of areas that the Federal Government can be considered to be approving, or to be "subsidizing" if we considered every single tax credit. Somehow or other, approval by all the American citizens in aggregate by this or that specific field of endeavor, charity or Federal exercise, like monetary expense.

Senator **Byrd**. Congressman, I congratulate you on being able to fill out your own income tax return. I am glad that that is not a requirement for election to the U.S. Senate, or some of us would not be here.

Representative **Dornan**. Senator, I think this year is my last. It took far too many days. I think, as a Congressman, there are other ways that I can invest my time now. I honestly do think next year will be the first time I will pay attention to the television commercials of Mr. Block and other people in getting some assistance.

Senator **Byrd**. Thank you, Congressman.

[The prepared statement of Mr. Dornan follows:]

[From the Congressional Record, Feb. 28, 1979]

The IRS and the Tax Exempt Status of Private Schools and Other Charitable Institutions

(By Hon. Robert K. Dornan of California)

Mr. **Dornan**. Mr. Speaker, the opportunity, indeed, the privilege, to express one's views freely and openly goes to the heart of our political tradition, a tradition characterized by deliberation and that exercise of reason which is the bond of civil society. As the philosopher has said: "Civilization is formed by citizens locked together in argument. From this dialogue the community become a political community."

Today, Mr. Speaker, Members of Congress are engaged in a dialog, if not indeed, locked in argument, with the Internal Revenue Service over certain fundamental propositions regarding the very nature and function of private, voluntary institutions and associations and their role in a democratic society. Because of the breadth and the complexity of the issues involved as well as the constraints of time for testimony, the focus of my testimony will be on the nature and purpose of tax exemptions and charitable deductions with particular attention to the distinction between Federal assistance, that is, subsidies, and tax exemption. My testimony is in light of the bill that I have introduced, H.R. 1002, which amends the Internal Revenue Code of 1954 to provide that the tax exemption of certain charitable organizations under 501(c)(3) and the allowance of a deduction for contributions to such organizations shall not be construed as the provision of Federal assistance, that is, Federal subsidies. This is to make original legislative intent in this matter unequivocally clear.

Mr. Speaker, one of the governing assumptions of the proposed IRS rulings, and central to this entire controversy (based primarily on the Federal court case of *Green* vs. *Connally*, 330 F. Supp. 1150 (1970)) is that tax exemption, Federal assistance, and Federal subsidies are one and the same thing. Since the IRS equates tax exemption with Federal subsidies, it argues that tax exemption may be denied to private schools and, by logical extension, to other private organizations, if such organizations do not conform to "public policy" (as interpreted, of course, by an unelected IRS official). Implicit in such an assumption, of course, is that nontaxation of certain organizations is somehow an abnormal condition, that the Government has the right and the duty to tax everything that lives and moves and has being. Anything that escapes taxation, according to this logic, is therefore conceived to be enjoying some kind of special privilege or immunity at the expense of the rest of society. I submit, Mr. Speaker, that such an assumption is thoroughly totalitarian in nature and at variance with our entire Anglo-Saxon legal tradition which holds to the proposition that the State is made for man, not man for the State. Let us, for a moment, examine that legal tradition as it relates to the nature and purpose of tax exempt institutions.

While the history of Federal tax exemption for charitable organizations dates back to 1894, the practice of exempting schools and religious organizations can be traced back to the British Statute of Charitable Uses of 1601 and to early state constitutional provisions (see Congressional Research Service—November 7, 1978). In the celebrated Supreme Court case of *Walz* vs. *Tax Commission of the city of New York*, 397 U.S. 664 (1970), Chief Justice Burger in his majority opinion, referring to tax exemption of religious bodies, wrote: "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.

"For so long as Federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the Government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference. It is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies," (pp. 676–77). If it be objected that the *Walz* case applies only to churches and not to schools, it is important to note that, in his opinion, the Chief Justice employs the phrase "toward churches and religious exercise generally * * * ." The Supreme Court case of *Lemon* vs. *Kurtzman*, 403 U.S. 602, 609 (1970) found that Christian education is a religious activity protected by the first amendment. As Justice Douglas noted: "The raison d'etre of parochial schools is the propagation of a religious faith," (p. 628).

Why, one wonders, should there be such an overwhelming consensus about the desirability of exempting charitable organizations (as defined under 501(c)(3) of the IRS Code), particularly religious organizations and schools? Two reasons, I would argue, may be cited: First, a practical consideration, taking into account the nature and purpose of tax exemption; second, a philosophical consideration which recognizes the vital and dynamic role of voluntary organizations in a democratic society.

The practical justification for exempting charitable organizations from Federal taxation is a recognition of the fact that they are nonprofit, nonwealth producing entities. As Professors Bittker and Rahdert of Yale University point out:

"*The exemption of non-profit organizations from federal income taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit,*" (Boris I. Bittker and George K. Rahdert, "The Exemption of Non-profit Organizations from Federal Income Taxation," 85 *Yale Law Journal*, at 299, (1976), emphasis added).

To put the matter somewhat differently, the purpose of charitable organizations is not to generate wealth; it is, rather, to pursue common needs and shared interests which more often than not redound to the benefit of the community. To tax nonprofit organizations would be pointless since they are not in any meaningful sense producers of monetary wealth. Moreover, and most importantly, the tax exempt status of nonprofit organizations is not an act of injustice toward the rest of society, requiring it to pick up the added burden. One the contrary, each of the members of such entities already pays his or her share of taxes.

It would, in fact, be "double taxation" if members of nonprofit organizations were to be taxed again for the time, effort, and money contributed to activities from which they derive no monetary gain. Such "double taxation" would, indeed, work to discourage the founding of nonprofit organizations. As the Supreme Court has noted in the *Walz* case (as cited previously):

"Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers . . . *Elimination of exemption would tend to expand the involvement of government by giving rise to tax evaluation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts* that follow in the train of those legal processes, (pp. 673–4, emphasis added).

We come now to the philosophical and, ultimately, more fundamental, justification for the tax exemption of charitable institutions: The role of voluntary associations in a democratic society.

Mr. Speaker, the prominent role that voluntary associations play in the United States has been commented upon by that keen observer of the American way of life, Alexis de Tocqueville. In his classic work, "Democracy in America," de Tocqueville notes that:

"Americans of all ages, all conditions, and all dispositions constantly from associations. . . . The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons and schools. . . . Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America." (Democracy in America, New York: Alfred Knopf, 1966, pp. 106 and 110).

The rich associational life of the United States, Mr. Speaker, provides a vehicle through which individuals may voluntarily participate to attain objectives which neither Government nor business is attaining or perhaps can attain. "Whenever a need is felt, a wrong is seen, a hope is envisioned, citizens can mobilize around it and bring their shared objectives to fulfillment. Without such vigorous voluntary organizations, society would be an amorphous mass of isolated, and therefore weak individuals—which apparently some people would like, for such a society would be much easier to manipulate and control * * * (voluntary organizations) give to democracy its vigor and reverberance. They provide the basis for resisting an oppressive Government and correcting its excesses * * * it is the prerogative of the people, through their voluntary organizations, to scrutinize and stimulate, correct and countervail their Government (Dean Kelley, "Why Churches Should Not Pay Taxes," New York: Harper & Row, 1977, pp. 28–29). Justice Brennan in his concurring opinion in *Walz* (as cited previously) observed:

"Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, *these organizations are exempted because they, among a range of other private, non-profit organizations, contribute to the well-being of the community in a variety of non-religious ways*, and thereby bear burdens that would otherwise either have to be met by general taxation, or left undone, to the detriment of the community . . . *Secondly, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, non-profit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society,"* (pp. 687–89, emphasis added).

We come now, Mr. Speaker, to the heart of the problem, the core of the controversy between the IRS and Members of Congress opposed to the proposed ruling. We challenge the assumption on the part of the IRS that tax exemption of organizations under 501(c)(3) of the Internal Revenue Code and the allowance of a deduction for contributions to such organizations, is a form of Federal assistance, that is, Federal subsidies, subject to revocation if not in accord with so-called "public policy." Once again, this is a purely totalitarian assumption which holds that the State or government owns all wealth. As Boris Bittker, Sterling Professor of Law at the Yale Law School points out, when Congress wrote the first modern income tax statutes, the Revenue Act of 1894 and the Revenue Act of 1913, only "net income" was to be taxed, thus excluding all nonprofit organizations, which have no net income. Professor Bittker goes on to explain:

"Neither the 'net income' concept nor the 'ability to pay' rationale for income taxation can be satisfactorily applied to charitable organizations. If our analysis and conclusions are well founded, *the exemption of these organizations from income tax is not a preference or a special favor, requiring affirmative justification, but an organic acknowledgement of the appropriate boundaries of the income tax itself . . . If non-profit organizations do not have 'income' in the ordinary sense, as we have argued, their exemption from income taxation is not properly classified as 'government aid' raising an establishment clause problem; it is, rather, a normal or even inevitable corollary of the economic and philosophical foundation on which the income tax itself rests,"* (*Yale Law Journal*, as cited previously, pp. 333, 345, emphasis added).

Justice Brennan in his concurring opinion in the Walz case makes a vitally important distinction between tax exemptions and subsidies. Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public moneys to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, in the case of direct subsidy, the State forcibly diverts the income of both believers and nonbelievers to churches, while in the case of an exemption, the State merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions. Tax exemptions, accordingly, constitute mere passive State involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy," (p. 691).

Mr. Speaker, it is of utmost importance to stress the operational distinctions between a tax exemption and a subsidy: First, in a tax exemption, no money changes hands between Government and the organization; second, a tax exemption, in and of itself, does not provide one cent to an organization; without contributions from its supporters, it has nothing to spend. Government cannot create or sustain—by tax exemptions—any organization which does not attract contributions on its own merits; third, the amount of a subsidy is determined by a legislature or an administrator; there is no amount involved in a tax exemption because it is open-ended; the organization's income is dependent solely on the generosity of its several contributors, each of whom freely and individually determine how much she or he will give; fourth, consequently, there is no periodic legislative or administrative struggle to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, et cetera, and the resources of Government are not expended in administering them; fifth, a subsidy is not voluntary in the same sense that tax exempt contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient; sixth, a tax exemption does not convert the organization into an agency of State action, whereas a subsidy—in certain circumstances—may (for the preceding enumerations, see Dean M. Kelley, as cited previously, pp. 33–4).

Parenthetically, I might add that the assumption that tax exemption, Federal assistance, and Federal subsidies are synonymous is troublesome for another reason. Recently, tax exempt status has been granted for organizations sympathetic toward such practices as witchcraft, homosexuality, and abortion (see Revenue Rulings 78-305 and 73-569). Are we, in effect, subsidizing such groups while questioning the legitimate and integral function of church related schools (see Supreme Court ruling of Lemon against Kurtzman cited earlier)? And will there truly be minority requirements based on race for organizations oriented toward gay rights, witchcraft, and abortion?

In addition to tax exemption, Mr. Speaker, some organizations benefit from contributions which donors can deduct from their taxable income before paying income tax. Among them are the organizations that are exempt from income tax under section 501(c)(3) of the Internal Revenue Code. When an organization loses its tax exemption, what is usually meant is not that it loses its tax exemption, since it usually qualifies for continued exemption under section 501(c)(4) or one of the other categories of section 501(c), but that its contributors are no longer able to deduct contributions to it from their taxable income.

Deductibility of contributions is a significant incentive to contributors, particularly those in higher income brackets, and it is justified by the consideration that they do not benefit personally from the contribution in the way that they would from dues paid to a labor union or shares in a credit union. Deductibility means that not only does the Government not claim a share of the contributions made to an organization after they reach the organization, but it abstains from taxing the donor on them before they reach the organization. The Commission on Private Philanthropy and Public Needs, known also as the Filer Commission, a prestigious private group, provides the following justification for the charitable deduction:

"The charitable deduction is a philosophically sound recognition that what a person gives away simply ought not to be considered as income for purposes of imposing an income tax. There is no fixed definition of income; it is a concept that acquires meaning by the context in which the term is used. In the context of personal income taxation, the commission believes it is appropriate to define income as revenue used for personal consumption or increasing personal wealth and to therefore exclude charitable giving because it is neither. . . . We think it entirely appropriate, in other words, for the person who earns $55,000 and gives $5,000 to charitable organizations to be taxed in exactly the same way as the person who earns $50,000 and gives away nothing," (*Giving in America: Toward a Stronger Voluntary Sector*, 1975, p. 128; for above discussion of deductions to charitable organizations, see Dean M. Kelley, as cited previously, pp. 34–35).

Finally, Mr. Speaker, I indicated earlier that the core of the controversy between the IRS and Members of Congress involves not only the assumption that tax exemption, Federal assistance, and Federal subsidies are one and the same thing, but that tax exemption would be subject to revocation by the IRS if the practices of organizations falling under 501(c)(3) were not in accord with "public policy" as interpreted by the IRS. The most devastating critique of such an untenable assumption is to be found in the recent Federal district court case (December 26, 1978) of Bob Jones University against United States of America (Federal district court of South Carolina, Greenville division). I respectfully urge all members of this subcommittee to carefully read and reflect upon the singular opinion issued by Judge Robert F. Chapman. I would like, at this time, to cite some highly pertinent passages from the decision.

Judge Chapman pointed out that:

"Although the purpose of the government's construction of 501(c)(3) may be considered secular in nature in that it promotes federal public policy, a primary effect is the inhibition of those religious organizations whose policies are not coordinated with declared national policy and the advancement of those religious groups that are in tune with Federal public policy. Instead of all religious organizations being on the same footing as was the case in *Walz*, the Government's construction of the section would saddle the burden of taxation only on those religious organizations whose procedures conflict with Federal public policy. One form of the oppression of religion by government is the taxation of it (Committee for Public Education vs. Nyquist, 413 U.S. 756.793, 37 L.Ed. 2d 948, 93 S.Ct. 2955 (1973)) . . . The construction of 501(c)(3) argued by the government would do away with the general grant of tax exemptions to all religious organizations, which was found in Walz to constitute an act of benevolent neutrality, and, in effect, transforms the statute into a law that provides a special tax benefit, because favorable tax status will be accorded only to some, not all, religious organization. . . . The effect is to strengthen those religious organizations whose religious practices do not conflict with Federal public policy *and to discriminate against those religious groups* whose convictions violate these secular principles. The unavoidable effect is the law's tending toward the establishment of the approved religions," (p. 16, emphasis added).

The intent of congressional legislation regarding section 501(c)(3) is of central importance in this case. Judge Chapman goes on to note:

"*Defendant* (in this case the U.S. Government) *acknowledges that the limitation which it has attached to 501(c)(3),* that an organization qualifying under one or more of the listed exempt purposes may be denied exemption if its practices violate public policy; *has no support in the language of the section.* The construction which the IRS has placed on 501(c)(3) troubles this Court. * * * This court concludes that defendant's interpretation cannot be sustained," (p. 18, emphasis added).

With regard to the notion of public policy, as being an overriding consideration, Judge Chapman continues:

"This Court disagrees with defendant and detects that there does exist a competing consideration underlying 501(c)(3) that must be weighed against public policy limitations. Defendant recognizes in its argument that the legislative intent behind this section was that exemptions should be granted to those organizations formed for the listed purposes, because they provide a reciprocal benefit to the public. *The desire of Congress not to tax religious and educational organizations that, presumptively, benefit society, does represent a competing consideration in this case to counterbalance the presumption against congressional intent to encourage violation of declared public policy.* * * * In the course of defendant's argument that there is no competing consideration to offset the public policy exception, defendant suggests that, because it has determined plaintiff racially discriminates, plaintiff does not benefit the public and, thus, does not merit exemption. The Court considers defendant's logic on this point as somewhat of a non sequitur. * * * *Public policy is many faceted,* one facet of which is that society may provide relief from taxation to those organizations, such as plaintiff religious organization, that are of benefit to the public. The good resulting to the public from these groups depends upon the fulfillment of their purposes. Because one of these organizations may have, in an area of its operations, engaged in conduct, that might not have been completely in line with some other aspect of public policy does not automatically mean that the public no longer benefits from the organization" (p. 23, emphasis added).

Now for the most devastating part of Judge Chapman's critique. He cites the Supreme Court case *Commissioner* vs. *Tellier,* 383 U.S. 687 (1966):

"*We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning.*"

He goes on to point out:

"The deduction and exemption provisions of the Code, where Congress has been wholly silent, are to be applied equally without regard to whether the taxpayer has committed an illegal act or violated public policy. . . . In these administrative pronouncements the IRS, in effect, announced that it will implement 501(c)(3) on the basis of whether the taxpayer has abided by federal law or public policy. The section is to become the IRS's mechanism for disciplining wrongdoers or promoting social change. The Supreme Court ruled in *Tellier* that use of the tax law for the former purpose is improper and it follows that the same rule would apply to the latter. In addition, *the Court is concerned by the many dangers inherent in defendant's interpretation that exemptions may be revoked for violations of federal public policy. Federal public policy is constantly changing. When can something be said to become federal policy? Who decides? With a change of federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. Citizens could no longer rely on the law of 501(c)(3) as it is written, but would then rely on the IRS to tell them what it has decided it to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel producing bureaucratic tyranny,*" (p. 25, emphasis added).

Judge Chapman argues to the point, and conclusively, when he notes that—

"*It is not permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertance that it failed to state something other than what it plainly stated,* (United States vs. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926, 929 (4th Cir. 1975). *In enforcing a construction of the statute which is unwarranted by its legislative history or express terms, the IRS has overstepped its authority and usurped that of Congress. . . . It is the province of Congress, not the IRS, to make the federal tax laws. . . . Should Congress desire to change the law, it may do so in keeping with the Constitution. This Court cannot, and will not, approve changes in the law by an administrative agency that completely bypasses the legislative process,*" (p. 28, emphasis added).

Mr. Speaker, the noted English author, Lewis Carroll, in his immortal classic, "Through the Looking-Glass," conveys a profound understanding of human nature which is highly pertinent to our own discussion. I would like to quote the following between Alice and Humpty Dumpty:

"When I use a word, Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

The issue at hand is clear, Mr. Speaker. Is Congress or the unelected IRS going to make the Federal tax laws in a republican form of Government? I hope my testimony has been helpful in answering that question unequivocally.

Senator BYRD. The next witness will be the Honorable Jerome Kurtz, Commissioner of the Internal Revenue Service.

Commissioner Kurtz, the committee is glad to have you this morning. Many of your writings already have been quoted, so we are glad to have the author with us.

You may proceed as you wish.

STATEMENT OF JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE

Mr. KURTZ. Chairman and members of the subcommittee, I appreciate the opportunity to appear here today to discuss the revised revenue procedure proposing guidelines to impelemnt the Service's obligation to limit tax exemption to private schools that operate on a racially nondiscriminatory basis.

I am accompanied this morning by Stuart Seigel, Chief Counsel.

The tax issue is a private school's entitlement to Federal tax exemption under section 501(c)(3) of the Internal Revenue Code. In addition to exemption from Federal income tax, qualification under this section allows contributions made to the organization to be tax deductible by the donors as charitable contributions under section 170(c)(2)(B) of the code.

Section 501(c)(3) exempts organizations organized and operated exclusively for religious, charitable, or educational purposes. An educational organization is not exempt under this section if it operates illegally or contrary to public policy. Racial discrimination in education is contrary to well established public policy. Under the law, the Service has an obligation to deny tax exemption to private schools that are racially discriminatory.

Under the code, a school is entitled to judicial review of any adverse IRS determination on exempt status. In the case of a court proceeding on a revocation, even if the revocation is judicially upheld, individual contributors may deduct contributions up to $1,000 until the date of the court's decision. It may be useful to describe the history of the Service's involvement with racial discrimination by private schools claiming tax exemption.

Racial discrimination in public education was ruled illegal and contrary to public policy in the 1954 Supreme Court decision of *Brown* v. *Board of Education* In 1967, the Service announced the position that racially discriminatory private schools receiving State aid were not entitled to tax exempt status.

Prior to 1970, however, the Service recognized as tax exempt racially discriminatory private schools that were not receiving State aid. That policy was challenged when the Service was sued by a number of black parents in Mississippi who asserted that no private school discriminating on racial grounds should be entitled to tax exempt status.

In 1971, a three-judge Federal court in the case of *Green* v. *Connally* held that racially discriminatory private schools are not entitled to tax exemption under section 501(c)(3). The decision would apply to a school without regard to whether it was receiving State aid. The Supreme Court affirmed that decision.

During the *Green* v. *Connally* litigation, the Service announced its position that racially discriminatory private schools are not entitled to tax exemption. The *Green* decision took note of that position and went on to conclude that it was not appropriate, but legally required. The Green court placed the IRS under a permanent injunction to deny tax exemption to schools in Mississippi that racially discriminate. The court also ordered the IRS to implement this order with regard to private schools located in Mississippi, the particular schools subject to the action, by requiring these schools to adopt and publish a nondiscriminatory policy, and to provide certain statistical and other information to enable the Service to determine if the schools are racially discriminatory. The Service examined private schools in Mississippi and applying similar procedures nationwide, revoked the exemption of a number of schools that would not state that they had a nondiscriminatory policy.

Since 1970 and the *Green* decision and injunction, the Service has taken a number of steps to implement the nondiscrimination requirement. In 1971, the Service published and explained generally the nondiscrimination requirement. In 1972, the Service published a revenue procedure setting forth guidelines for certain private schools claiming tax exemption to publicize a racially nondiscriminatory policy. That procedure provided several examples of methods by which publication could be made, but did not require the use of any particular method.

In 1975, the U.S. Commission on Civil Rights criticized the absence of specific guidelines to identify schools which should be examined and to determine whether schools are discriminatory.

The Service then published Revenue Procedure 75-50, which required all tax exempt private schools to adopt formally a nondiscriminatory policy, to refer to this policy in all borchures and catalogs and generally, to publish notice of this nondiscriminatory policy annually in a newspaper or by use of the broadcast media. In comments submitted on that procedure, the Civil Rights Division of the Department of Justice recommended that the Service adopt stronger guidelines focusing on a private school's history with respect to public school desegregation as well as its asserted policies.

The Service also published a revenue ruling in 1975 clarifying its position that private schools operated by churches, like other private schools, may not retain tax exemption if they are racially discriminatory. A 1977 district court decision is in accord with this position. Another district court in the same circuit recently held that a particular private school, Bob Jones University, was a religious organization not subject to the nondiscrimination requirements applicable to educational institutions. The Government considers this decision to be wrong, and is appealing it.

In 1976, the Supreme Court decided the case of *Runyon* v. *McCrary* which involved a proprietary, nonsectarian school that denied admission to blacks. The Supreme Court held that the 1866 Civil Rights Act made it illegal for the school to deny admission to blacks. This decision would apply to a school without regard to whether it receives any Federal or State aid. The *Runyon* decision amplified the strong public policy against racial discrimination in private schools and thus further supports the Service position that private schools that discriminate on racial grounds are not entitled to tax exemption under section 501(c)(3).

In 1976, the plaintiffs in the *Green* case reopened that suit, asserting that the Service was not complying with the court's continuing injunction that Mississippi private schools which are racially discriminatory be denied tax exemption.

In addition a companion suit was filed, *Wright* v. *Blumenthal*, asserting that the service's enforcement of the nondiscrimination requirement on a nationwide basis was ineffective. These two cases are now pending before the Court.

This litigation prompted the Service once again to review its procedures in this area. It focuses our attention on the adequacy of existing policies and procedures as we moved to formulate a litigation position. We concluded that the Service's procedures were ineffective in identifying certain schools which in actual operation discriminate against minority students, even though the schools may profess an open enrollment policy and comply with the yearly publication requirement of Revenue Procedure 75-50.

A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. This position is indefensible. Just last year, the U.S. Commission on Civil Rights criticized the Service's enforcement in this area as inadequate, emphasizing the continuing tax exemption of such adjudicated schools.

The effect of current IRS procedures has been that the tax exemption of a school which adopts a nondiscriminatory policy in its governing instrument and publishes it annually will likely remain undisturbed unless some overt act of discrimination comes to the attention of the Service.

Racial discrimination takes many forms. In the clearest cases, a school may have a stated policy of racial discrimination or may have turned away minority student applicants on racial grounds. The Service's existing guidelines would call for denial of exemption in such cases.

However, Federal courts have also carefully scrutinized schools which while having a stated policy of nondiscrimination, were formed or substantially expanded at or about the time of public school desegregation in the community served by the school. Courts have held such schools discriminatory if the formation or expansion of the school was related in fact to public school desegregation, the school has an insignificant number of minority students, and the school has not taken active steps sufficient to convey to the minority community that minority students are welcome.

Of course, not all schools that discriminate racially have been adjudicated discriminatory by a court or agency, and the Service must conduct its own examinations in this area. In examining a nonadjudicated school, the Service should apply standards consistent with those used by courts in adjudicated racial discrimination cases.

After reviewing the court decisions, the standards used in those decisions, and our existing guidelines, we concluded last year that more specific guidelines were needed to focus on certain schools' actual operations to verify if their actual practices conformed to their asserted policies.

Last August, the Service published in proposed form, a revenue procedure providing guidelines to be used in reviewing a school's racial policy.

Many public comments were received and on December 5 through 8, we conducted a public hearing on the proposal. After reviewing the written and oral comments, we made substantial revisions in the proposal and issued it on February 9, again in proposed form, inviting written public comment. The comment period ended April 20 and we are now studying the suggestions made.

The revised proposed procedure was designed to enable us to identify those racially discriminatory schools that we have had difficulty identifying under existing procedures. At the same time, the revised procedure was designed to avoid problems presented by the earlier proposal, which was not sufficiently flexible to take account of all relevant factors. The revised proposal gives greater wieght to each school's particular circumstances, to avoid administrative denials of exemption to schools that are not in fact racially discriminatory. Discretion to take account of all relevant circumstances is essential to making accurate determinations in this area.

The earlier proposal would generally have classified a school formed or substantially expanded at the time of public school desegregation as reviewable if its percentage of minority enrollment was less than 20 percent of the percent of school age minorities in the community. Such schools would have been required to show, by the existence of at least four out of five specific factors, that the relatively low level of minority enrollment was not due to racially discriminatory policies.

The new proposal would not classify a school as reviewable unless the school meets three criteria. First, it must have been formed or substantially expanded at the time of public school desegregation in the community served by the school. Second, it must have insignificant minority student enrollment, and third, its creation or substantial expansion must be related in fact to public school desegregation in the community.

Whether a school has significant minority student enrollment depends on the school's particular facts and circumstances. For example, we modified the earlier proposal to provide that consideration will be given to any special circumstances limiting the school's ability to attract minority students, such as an emphasis on special programs or curricula which by their nature are of interest only to identifiable groups that lack a significant number of minority students, so long as such programs or curricula are not offered for the purpose of excluding minorities.

In addition, we provide a safe harbor guideline. A school that meets the 20 percent test is considered to have significant minority enrollment and will thus not be reviewable. Whether a school's formation or expansion was related in fact to public school desegregation also depends on all the circumstances. The proposal contains illustrative factors to be considered in making this determination.

For example, whether or not the students enrolling in the private school were drawn from the public schools undergoing desegregation would be a relevant factor in making this determination. A school classified as reviewable under the new procedure will be considered racially discriminatory unless it has undertaken actions and programs reasonably designed to attract minority students on a continuing basis.

The new proposal does not require four out of five specific types of actions to be taken in every case, but rather provides flexibility for the particular school to take action appropriate in its circumstances. This proposal contains examples of actions that a school might take. Some critics of the proposal have suggested that all reviewable schools would be required to take all the steps listed in the proposal in order to be tax exempt.

This is not what the proposal provides. Those actions and programs are simply examples of actions and programs that could be reasonably designed to attract minority students on a continuing basis.

To help assure that the procedure is being correctly and consistently applied, the new procedure provides for national office review of all applications for exemption and of all examinations of private elementary and secondary schools. All actions, favorable or unfavorable, will be reviewed in the national office. A school is also entitled to judicial review of any adverse Service action.

The Internal Revenue Service must make administrative decisions one way or the other regarding the tax exempt status of private schools. If we take no action in this area, that itself is a decision. We proposed this revenue procedure as a reasoned response to the need for standards under which decisions can be made which are correct and defensible in litigation. The Service will administer the standards fairly and responsibly.

Senator **Byrd**. Thank you, Mr. Commissioner.

The committee permitted the witness to exceed the 10 minute time limitation because the chair felt that his testimony was necessary in the detail that it went into, so a full understanding of what the Commissioner proposes could be had, and also because the Congressman and the Senator, taking a different view, had exceeded the limitation, but from here on out, the chair will have to enforce the time limitation which varies from case to case.

Mr. Kurtz, is it not correct that the IRS today and the law today requires, for the maintenance, of tax-exempt status that schools include a statement of nondiscriminatory policy in its by laws, that it mentions such a policy in publications and publicly announce a nondiscriminatory policy once a year?

Mr. **Kurtz**. That is correct, Mr. Chairman.

Senator **Byrd**. That has to be done right now?

Mr. **Kurtz**. Yes, sir.

Senator **Byrd**. Is it not correct that the IRS today, right now, has the administrative authority to deal with schools which practice discriminatory policies?

Mr. **Kurtz**. Yes.

The problem, if I may take a moment to elaborate on that, the problem is that we do not believe that the revenue procedure, in any way makes new law. It provides guidance for personnel and for the Service in administering this set of rules and in examining cases, and we believe it is based on existing case authority.

Today, a revenue agent examining a school on this issue, for example, would be free to read the cases that have been decided in the school discrimination area and to make decisions, but the guidance that exists today is not sufficiently clear to assure uniformity of administration. The original purpose of the revenue procedure was to provide sufficiently clear guidelines so that our personnel would be examining on a consistent basis and that all schools would be reviewed on a consistent basis.

Senator **Byrd**. Some of my colleagues in the Congress take the philosophical view that all income earned by an individual belongs to the Government except that which the Government permits the individual to retain. Is that your view?

Mr. **Kurtz**. No, it is not, Mr. Chairman. Let me say also that the substantive question involved in this revenue procedure does not in any way depend on whether one views tax exemption or deduction as a Federal grant or not. The revenue procedure is attempting to define the words in the Internal Revenue Code against the background of cases that have been decided.

The Internal Revenue Code, by its terms, grants an exemption to certain classes or organizations—not to all organizations, but to certain types of organizations, and the Internal Revenue Service is charged with the responsibility of administering that law. It has to decide in questionable areas just what the code means.

Under section 501(c)(3), which is the code section covering the exempt status for charitable organizations, the question is whether an educational organization which operates, let us say, in a completely illegal way, is entitled to tax exemption. We believe it is quite clear that section 501(c)(3) requires not only that the organization provide some sort of education, but also in the overall broad sense, that it be charitable, which means that it not operate against well defined public policy.

Senator **Byrd**. If it is in operating in an illegal way, you have recourse today. You do not need additional regulations to act.

Mr. **Kurtz**. We believe that this revenue procedure does not go beyond that.

Senator **Byrd**. Did I understand you correctly to say that you planned to review every tax exempt organization in the country?

Mr. **Kurtz**. No, sir.

Senator **Byrd**. What did you say in your testimony?

Mr. **Kurtz**. What I said in my testimony was that in cases where the issue is whether or not a school is racially discriminatory the final determination will be reviewed in the national office.

The purpose of that is to try to assure a high degree of uniformity in administration. That is just on this issue.

Senator **Byrd**. I do not know of anyone in the Senate or the Congress who is seeking to advocate, justify, to bring about, or to maintain discriminatory practices in the schools. I do not know of anyone who takes that position.

I think the fear on the part of many Members of the Congress is that the Internal Revenue Service is taking the position that all schools are discriminating unless they prove they are not discriminating. This is a philosophy upon which French law is grounded: a person is guilty until he proves himself innocent. I have always thought that the American system was that an individual was innocent until the Government proved him to be guilty.

Mr. **Kurtz**. I agree with that, certainly.

Senator **Byrd**. Your regulations appear to go in the opposite direction.

Mr. **Kurtz**. No. I think there has been a considerable amount of misunderstanding about that, if I may say so. When any organization applies for a tax exemption as an initial proposition on the grounds that it is an educational organization or a hospital or a museum, or whatever, it must submit information which is adequate for the Service to make the determination that the organization does or does not fit within the statutory language.

Senator **Byrd**. This has all been done, has it not, by all of these groups?

Mr. **Kurtz**. There are two questions—applications and examinations. We have schools applying for tax exemption all the time. It is a continuing problem.

Senator **Byrd**. When they do, you examine them very carefully and make a determination.

Mr. **Kurtz**. Yes; that is correct.

After an organization is granted an exemption, then we also have a responsibility from time to time to examine that organization to see if it is being operated in a way consistent with the requirements of the law. In the course of that examination, we have to call upon the organization to submit certain information. They are the ones who possess the information and, in that sense, they must come forward with the information.

Yes; there is no presumption that they are qualified until they prove that they are, just as in any examination of any individual's income tax return, that individual has to come forward and substantiate deductions. The individual is the one who has the records.

Senator **Byrd**. Senator Helms?

Senator **Helms**. Thank you, Mr. Chairman. Let me reiterate my appreciation to you, sir, for inviting me to be here today. Before I begin questioning, I have a prepared statement. In the interests of time, I would like to ask that it be made a part of the record at the appropriate place.

Senator **Byrd**. Yes. It will be made part of the record.

[The prepared statement of Senator Helms follows:]

Due Process for Private Schools

IRS ACTS WITHOUT SPECIFIC CONGRESSIONAL AUTHORITY

By Mr. Helms (for himself, Mr. Ford, Mr. Schweiker, Mr. Stevens, and Mr. Zorinsky):

S. 995. A bill to amend the Internal Revenue Code of 1954 to require the Secretary of the Treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to a private school on the grounds of racial discrimination; to the Committee on Finance.

Mr. **Helms**. Mr. President, since the IRS announced its policy to deny tax-exempt status to private schools which allegedly operate on the basis of a policy of racial discrimination, it has done so without the legal authority of specific legislation.

In a public statement made on January 9, 1978, IRS Commissioner Jerome Kurtz discussed the proposed regulations and admitted that the IRS has "almost no specific statutory guidance" in moving into this area. Instead, the IRS has argued that private schools must be treated as charitable organizations and has applied to them the common law principle that a charity must not operate illegally or contrary to public policy. The IRS has then defined this broad public policy mandate in terms of Brown against Board of Education and title VI of the Civil Rights Act of 1964.

In his testimony before the IRS public hearings on behalf of the National Committee for Amish Religious Freedom, the Association of Christian Schools International, Organized Christian Schools of North Carolina, and the North Carolina Association of Christian Schools. Mr. William B. Ball took issue with this theory by the IRS. Mr. Ball observed:

"The guidance (the Commissioner) said, has been derived from Brown v. Board of Education, and 'the broad national policy announced in the Civil Rights Act of 1964'. The Proposed Revenue Procedure also cites Norwood v. Harrison and Green v. Connally. I wonder why. These citations are simply not in point. What the IRS administrators have done here is to convert a thimble-full of assumed, but not-existent, statutory power into an ocean of regulation. The Proposed Revenue Procedure can only be described as 'home made' law. If it is desired to impose such restrictions on churches, then IRS must go to the lawmaker, the Congress, and make candid and public plea *there*—be *willing* to face the arguments of the people in *that* forum."

Similarly, in his testimony before the House Ways and Means Oversight Subcommittee, Dr. Robert Lamborn, executive director of the Council for American Private Education, considered the IRS theory and stated:

"This view is not supported by the legislative history of the act and has been soundly criticized by commentators. CAPE would vigorously oppose resting the authority of the IRS for the revenue rulings prohibiting racial discrimination in private schools on Title VI. If accepted, it would follow that other federal statutes which apply conditions to direct recipients of federal aid would also apply to private schools, a position which CAPE believes is legally insupportable and indefensible as a matter of education policy."

Dr. Lamborn continued in his testimony to call upon Congress to take the lead in setting fundamental policy in this important area and to provide explicit authority for the IRS position while limiting the discretionary power of the IRS to change or expand public policy applicable to tax-exempt private schools."

Another witness before the House Ways and Means Oversight Subcommittee, Dr. Mark I. Klein of the northern California district of the American Jewish Congress, observed:

"There is no compromise possible with the Internal Revenue Service on this issue which does not place our community, and others like ours totally innocent of racial discrimination, in grave danger in the future. We have no reason to question the good faith and intent of the current government, but the painful lessons of history teach that the future is always uncertain. These regulations probably exceed the Constitutional limits of the government's administrative powers."

The theory put forth by the IRS to defend its proposed procedures represents a profound distortion of the administrative process. Administrative agencies, such as the IRS, operate by means of delegated power from Congress. They are creatures of Congress and receive their power to act only from specific statutes. It is fanciful to suggest that in the absence of specific statutory authority the IRS is empowered to act in tax matters on the basis of laws and court decisions dealing with public education. This distortion is compounded when an administrative agency seeks to regulate in an area affecting sensitive first amendment rights.

Indeed, Mr. President, it is more than curious that 2 years ago the IRS itself argued in Federal court against many of the very same procedures it now proposes. At that time, the IRS maintained that the legality of such procedures is highly doubtful. The IRS admitted, for example, that a private school may have few minority students because of many factors other than discrimination.

IRS ACTION DISTORTS INTERNAL REVENUE CODE

The IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purposes as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet the requirements of one of the other listed purposes.

The enumeration of exempt purposes in section 501(c)(3) is plain and unambiguous. It states that organizations are exempt which are "organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." By the rules of statutory construction, the word "or" must be read after each of the listed categories. This section is to be read to mean "religious OR charitable OR scientific OR educational".

Congress clearly did not intend that "religious" or "educational" purposes be included under or in addition to a requirement of a "charitable" purpose. If Congress had wanted to provide for the double test of charitable and one other listed purpose, it could have done so with language such as: "Organized and operated exclusively for charitable (including, religious, scientific, testing for public safety, literary, or educational) purposes."

However, Congress did not use this statutory construction.

One important reason for rejecting such statutory language is the fact that it misstates the purpose of a religious organization. A church or a church-related school is not organized and operated exclusively or even substantially for charitable purposes. Such an organization is organized in the exercise of constitutionally protected rights of worship and religion which may or may not include works of charity. As the Supreme Court recognized in *Waltz* v. *Tax Commission*, 397 U.S. 664 (1970), the tax exemption of religious organizations does not depend upon their serving some pragmatic community purpose.

The general IRS regulations dealing with section 501(c)(3) state with equal clarity:

(d) Exempt Purposes—(1) In general

(i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively *for one* or more of the following purposes:

(a) Religious,
(b) Charitable,
(c) Scientific,
(d) Testing for public safety,
(e) Literary,
(f) Educational, or
(g) Prevention of cruelty to children or animals.

. . . *(iii) Since each of the purposes specified in subdivision (1) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it organized and operated exclusively for any one or more of such purposes.* (emphasis supplied) 26 C.F.R. Sec. 1.501(c)(3)-1(d)(1), (2).

By basing its new revenue procedures on an interpretation of section 501(c)(3) which is unwarranted by its legislative history and its express terms, the IRS has overstepped its authority and usurped the authority of Congress. In ***Manhattan***

General Equipment Co. v. *Commissioner*, 297 U.S. 129 (1935), the Supreme Court clearly set the limits of an agency's power:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

As the Supreme Court later ruled, "this reasoning applies with even greater force to the Commissioner's rulings". *Dixon* v. *United States*, 387 U.S. 68 (1965). By seeking to alter the law in this proposed revenue procedure, the IRS has unconstitutionally attempted to seize a power reserved solely to Congress.

IRS ACTION DISTORTS COURT DECISIONS

The IRS relies upon *Norwood* v. *Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974) to support its contention that a private school can legally be denied a tax exempt status on the grounds of its racially discriminatory actions. However, the facts in Norwood differ from those involving the proposed IRS procedures in two substantial aspects.

First, unlike under the IRS procedure, the schools in Norwood were found to be operated in a racially discriminatory manner by a court. The court did not propose, as the IRS has done, to look to a "safe harbor test" or revoke the presumption of innocence on the basis of when the school was organized. It formulated a simple and constitutional test. It stated:

"It is important to emphasize that the ultimate issue . . . is not whether black students are actually enrolled at the school, but whether their absence is because the school has restrictively denied their access; simply, does the school have a racially discriminatory admissions policy?"

Second, the Government action involved in Norwood was not tax exemption, but a State financed textbook program. This is a fundamental difference in the facts of two situations. The Supreme Court has, for example, struck down State textbook programs for church-related schools while upholding the constitutionality of tax exemption of churches. In a constitutional sense, a tax exemption is not a subsidy. The theory, now adopted by the IRS, that a tax exemption constitutes just such a tax benefit was argued before the Supreme Court in *Waltz* v. *Tax Commissioner*, 397 U.S. 664 (1970) and was rejected. In his concurring opinion, Mr. Justice Brennan stated:

"Tax exemptions and general subsidies, . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy."

It is interesting to note that in Norwood, the Court found two schools which had no minority students, but which had a nondiscriminatory admissions policy could not be forced to withdraw from the textbook program. This decision does not stand for the principle, as the IRS asserts, that a private school must undertake an affirmative action program to obtain minority students in order to convince government officials that it does not have a racially discriminatory policy.

The IRS relies upon the decisions of two Federal courts which have denied tax exempt status to organizations which maintain a policy of racial discrimination. *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314 (E.D.N.C. 1977). While these courts refused to accept the contention of the IRS that in enacting section 501(c)(3), Congress intended organizations to qualify under the common law of charitable trusts, they nonetheless terminated the schools' tax exemption on the basis that their activities violated Federal policy.

In coming to a decision in the Green and Goldsboro cases, the courts improperly extended the decision of the Supreme Court in *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30 (1958). First, the decision in Tank Truck concerned the legality of a taxpayer's deductions, not the tax exempt status of a private organization. Second, the taxpayer's conduct in Tank Truck involved violations of State law, not an ambiguous public policy as defined by the IRS.

The Tank Truck case involved a trucking company which encouraged its drivers to exceed speed limits in order to provide customers with faster service. The company would pay its employees' speeding tickets and then deduct the amount from its corporate income tax. The Supreme Court found that allowing this deduction would directly encourage violations of State law by lessening the penalty of the fine. In its opinion, the Court outlined the test to be applied in these situations:

"This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. "It has never been thought . . . *that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible.*" Although each case must turn on its own facts, *the test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction.*

The IRS proposed procedure fails to meet the Court's test of "immediacy" as outlined in Tank Truck. The facts of that case revealed a direct cause and effect relationship between the encouragement of illegal conduct by reducing the sting of the penalty mandated by State law. However, in regard to private schools, the mere fact of tax exemption does not encourage the school to adopt a policy of racial discrimination. If the IRS can ignore the Supreme Court's rule that there is to be a cause and effect relationship between the deduction or exemption, then why not deny all such tax treatment to any taxpayer who violates any law?

IRS ACTION IGNORES RELIGIOUS NATURE OF SCHOOLS

The religious schools affected by the proposed procedures select their teachers, staff and students on the basis of their religious commitment. As the Supreme Court held in Lemon these religious schools are "integral parts of the religious mission" of the churches and religious organizations which operate them. Many parents sincerely believe it is a religious necessity and a duty in conscience to have their children enrolled in religious elementary and secondary schools, as found by the Supreme Court in Yoder. These schools seek out teachers and staff who totally agree with the moral and faith standards of the church or religious community appointing them.

Often these teachers in church-related schools are considered ministers or board members of the affiliated churches. These strict standards are maintained because the religious faith of these communities is encouraged among students not only by instruction, but by the very presence of teachers who exhibit and display firm religious beliefs and moral conduct. It makes a mockery of the constitutional doctrine prohibiting the entanglement of the Government in religious matters, for an agency of the Federal Government to insist upon setting hiring and admission rules which substantially affect the religious mission of these schools.

In its decisions affecting church-related schools, the Supreme Court has found that the activity and purpose of these schools is essentially religious in nature. For example, in ***Meek*** v. ***Pittinger***, 421 U.S. 349 (1975) the Court stated:

"The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."

Mr. President, it strains the bounds of logic to assert that these schools change from essentially religious to essentially secular depending upon the Government interest to be served.

The misunderstanding by the IRS of the essential nature of religious and church-related schools manifests itself throughout the proposed revenue procedures. For example, the IRS proposal creates a new obligation on the part of these schools to the community in which they reside. While this obligation may be consistent with the IRS theory which regards such schools as charitable organizations, it is not consistent with the religious purpose and operation of the schools themselves.

As William Ball pointed out, the term "community" as used in the proposed revenue procedure "bears no rational relationship whatever to the religious necessities" of the religious schools affected by the proposal. The obligation of religious schools is clearly to a geographical community.

But unlike public schools which serve a geographical region, church-related schools serve their own faith communities. The error of the IRS proposal, Mr. Ball continued, "is that it attempts to force the schools of the faith communities to be related to population patterns of public school districts." The affirmative action quota burden imposed upon religious schools is determined by the racial make-up and desegregation problems of the public schools in their area without reference to the needs and resources of their own religious communities.

IRS ACTION VIOLATES ESTABLISHMENT CLAUSE OF FIRST AMENDMENT

Conflict with the Establishment Clause of the first amendment is the unavoidable result of the IRS proposal. All religious organizations, under the IRS theory, could be denied tax exemptions unless the IRS has judged the organization's purposes and practices to be in line with expressed Federal policy. According to IRS, only religious organizations, whose purposes and practices are in harmony with those of the

Federal Government, will be granted an exemption. To preserve its tax exemption, a church, or other religious organization such as a religious school, would have to make sure it stayed in step with Federal public policy.

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the Supreme Court stated its well-known test for determining if a statute contravenes the Establishment Clause: "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive entanglement with religion?"

Regardless of the stated purpose of the IRS procedures, a primary effect will be the inhibition of those religious organizations whose policies are not consistent with national policy as declared by the IRS and the advancement of those religious groups that conform with Federal public policy.

The Supreme Court in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), determined that the granting of property tax exemptions equally to all churches did not violate the Establishment Clause of the first amendment. But, instead of all religious organizations being treated equally, as was the case in Walz, the new IRS proposal places the burden of taxation only on those religious organizations whose procedures the IRS has determined conflict with Federal public policy. As the Supreme Court observed in Committee for Public Education against Nyguist, one form of the oppression of religion by government is taxation. In Nyguist, the Court commented as follows: "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. 413 U.S. 756 (1973)."

The construction of section 501(c)(3) argued by the IRS would do away with the general grant of tax exemptions to all religious organizations, which was found in Walz to be an act of benevolent neutrality. Instead, it would transform the statute to provide a special tax benefit to some religious organizations. Since only selected religious institutions would receive exemption under the IRS interpretation, tax exemption provided by section 501(c)(3) no longer manifests neutrality toward all religions but favors some groups over others. The IRS procedures will strengthen and promote religious organizations whose religious practices do not conflict with Federal public policy and discriminate against religious groups whose convictions may conflict with those principles. Thus it essentially runs afoul of the second test articulated in Tilton, that is, a primary effect to advance or inhibit religion. Such a result strikes at the heart of the establishment clause of the first amendment.

The IRS proposal would also violate the third test of Tilton in that its administration fosters an excessive entanglement with religion. The revised revenue procedures maintain the presumption against private schools on the basis of when the school was established, they retain the affirmative action quota system for student admissions and the procedures limit the evidence which a school may use to overcome the presumption of racial discrimination.

These procedures mandate extensive and unwarranted oversight by an agency of the Federal Government concerning the day-to-day activities of hundreds, possibly thousands, of religious schools and religious organizations. Under the IRS theory, the Government would be required to monitor continually the practices of religious organizations to determine their entitlement to exemption. The proposed IRS regulations provide for a sustained and detailed administrative relationship between the Federal Government and church-related schools.

Recently, the fifth circuit court of appeals outlined the strict standard by which Government regulation of first amendment rights is to be measured:

"Only in rare instances where a compelling state interest in the regulation of a subject within the State's constitutional power to regulate is shown can a court uphold state action which imposes even an incidental burden on the free exercise of religion. In this highly sensitive constitutional area only the gravest abuses, endangering paramount interests given occasion for permissible limitation." *Sherbert* v. *Verner*, 374 U.S. 398 (1963). "Restrictions on the free exercise of religion are allowed only when it is necessary to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

Mr. President, I believe it is clear that the IRS has failed to meet this standard and others developed by the Supreme Court and the Constitution to protect the free exercise of religion. The vast majority of private schools to be affected by the proposed procedures are church related or religious schools. Many of these schools are operated by religious minorities which have been subject to discrimination and other sanctions in our society.

It is too easy to lose sight of the fact that this issue involves the rights of two groups of minorities, one which is ethnic and the other religious in character. Both groups have suffered unequal treatment during the course of American history.

Both groups have important constitutional rights which must be respected. The present difficulties with the IRS procedures point to the problems which arise when an administrative agency without authorization or guidance from Congress attempts to take it upon itself to resolve such sensitive issues.

Mr. President, it is the responsibility of Congress to examine the issues presented in this question. The legislative process is well suited to affording all interested parties a fair and open hearing. If new national policy is to be set on this matter, then it is the lawmaker, the Congress which should act.

THE PRIVATE SCHOOL NONDISCRIMINATION AND DUE PROCESS ACT OF 1979

The "Private School Non-Discrimination and Due Process Act of 1979" for the first time authorizes the IRS to deny the tax-exempt status of, and the deductibility of contributions to, a private school which racially discriminates as to students. It provides for the Secretary of the Treasury to bring declaratory action in the Federal courts to determine whether a particular private school racially discriminates.

The Congress has not yet legislated in either respect. The bill reestablishes the role of Congress in determining law in this area in a manner consistent with the Constitution, prior Federal statutes and case law.

Under pressure of litigation, the IRS has issued revenue procedures prohibiting racial discrimination as to students in tax-exempt private schools. These procedures are founded on a claim of "public policy" as determined by the IRS. They are not sensitive to the policies and programs of religious schools which limit or grant preferences and priorities, in admissions to students who are members of a particular religious organization. The bill draws upon the efforts of the IRS represented in various revenue rulings while establishing that the Congress is responsible for making policy decisions with respect to the Internal Revenue Code.

The definitions "private elementary or secondary school" and "a racially discriminatory policy as to students" as used in this bill are drawn from the IRS Revenue Procedures. The definitions also make explicit what is mandated by the Constitution, namely that admissions decisions of religious schools are not racially discriminatory if they limit or grant preferences or priorities to students who are a member of a particular religious organization.

The authority of the IRS for its present revenue ruling is suspect, having been upheld by one district court but rejected by another. The rationale for the authority of the IRS, which is based on "public policy" is suspect as a matter of law and open-ended in terms of bureaucratic discretion. The suggestion by some that the authority of the IRS should be based on the theory that indirect assistance through tax exemption and charitable deductions should be viewed as Federal financial assistance under title VI is contrary to the intent of Congress and is explicitly rejected by this legislation.

Under section 7428 of the current Internal Revenue Code, a tax-exempt organization has the right to seek a declaratory action against the IRS after exhaustion of administrative appeals. This is too late for private schools which are dependent, for their financial viability, on the assurance that contributions will be tax deductible. In addition, private schools are in a worse position than public schools which, under Title VI of the Civil Rights Act of 1964 are entitled to notice, hearing before an administrative law judge, and review by the Federal courts prior to fund termination.

This bill provides that allegations of racial discrimination as to students in a private school must be determined by a declaratory action suit brought by the Secretary of the Treasury in a Federal district court for the district in which the school is located. This assures elementary due process to a private school including adjudication by the Constitutional branch of government well versed in determining on the basis of evidence whether an organization in face discriminates.

The declaratory action requirement will also insure that the rights of religious schools which are threatened by allegations of racial discrimination will be determined by a Federal district court and not by an administrative agency which has no formal third party adjudicatory procedures and which under current practice now services as legislator.

Finally, the bill does not require the Secretary of the Treasury to seek declaratory action if a private school has not adopted and published a nondiscrimination policy as to students or if the school has already been determined to discriminate in a Federal court action or that issue is before a Federal court at the time the bill becomes effective.

Mr. President, I ask unanimous consent that the Private School Non-Discrimination and Due Process Act of 1979 be printed in the Record at the conclusion of my remarks.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S.995

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. FINDINGS; DECLARATION OF CONGRESSIONAL POLICY.

(a) The Congress finds that—

(1) discrimination based on race in the public schools violates the Constitution and Acts of Congress, including title VI of the Civil Rights Act of 1964, and the elimination of discrimination based on race in all educational opportunities is a fundamental national goal;

(2) the Supreme Court has held under the Civil Rights Act of 1866 that a private elementary school may not discriminate on the basis of race in the admission of students, but the Congress has failed to provide guidance as to the tax-exempt status of such schools;

(3) revenue rulings and procedures adopted by the Internal Revenue Service which deny tax-exempt status to private schools that discriminate on the basis of race are not based on a specific statute but rest on broad grounds of fundamental public policy as determined by the Service;

(4) the financial viability of many private schools, including scholarship programs, rests on the assurance that contributions to the school are deductible under the Internal Revenue Code, and any action by the Internal Revenue Service affecting the tax-exempt status of a school threatens its existence;

(5) revenue rulings and procedures adopted by the Internal Revenue Service have not been sensitive to private schools which limit, prefer or grant priorities in admissions to students which are members of religious organizations;

(6) many private schools operated by a particular religion or religious association form an integral part in carrying out the religious mission of the affiliated churches or associations in the free exercise of religion by their members.

(7) various Acts of Congress which condition Federal financial assistance to grantees, such as title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, do not apply to organizations simply because they are tax-exempt;

(8) the Congress has provided in title VI of the Civil Rights Act of 1964 that a public elementary and secondary school system is entitled to notice and a full evidentiary hearing on allegations of racial discrimination including the right to appeal an adverse decision to the Federal courts, prior to the termination of Federal funds; and

(9) neither the Congress nor the Internal Revenue Service has provided for impartial adjudication of allegations of racial discrimination prior to withdrawal of the advance notice of deductibility with respect to contributions to, and the determination of the tax-exempt status of, a private school.

(b) Therefore, the Congress determines that a private school which in fact racially discriminates as to students should not be entitled to tax-exempt status, and contributions to such schools should not be deductible under the Internal Revenue Code of 1954, and further determines that the Secretary of the Treasury should be required to bring a declaratory action in the Federal courts to adjudicate whether a private school in fact racially discriminates as to students prior to any action which affects the tax-exempt status of, or deductibility of contributions to, such school.

"SEC. 2. SHORT TITLE.

This Act may be cited as the "Private School Non-Discrimination and Due Process Act of 1979".

SEC. 3. DECLARATORY JUDGMENT PROCEDURE ESTABLISHED.

(a) IN GENERAL.—Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to civil actions by the United States) is amended by redesignating section 7408 as 7409, and by inserting after section 7407 the following new section:

"SEC. 7408. ACTION TO REVOKE OR DENY TAX-EXEMPT STATUS OF PRIVATE SCHOOL ON BASIS OF RACIAL DISCRIMINATION.

"(a) GENERAL RULE.—The Secretary may not—

"(1) revoke or change the qualification or classification of a private school as an organization described in section 501(c)(3) which is exempt from taxation under section 501(a),

"(2) deny, withhold approval of, the initial qualification or classification of a private school as such an organization, or

"(3) condition acceptance or approval of an application for qualification or classification of a private school as such an organization, or

"(4) revoke the advance assurance of deductibility issued to a private school.

on the grounds that the school discriminates on the basis of race as to students unless a court of the United States, in a civil action for a declaratory judgment brought by the Secretary in accordance with the provisions of this section, has found that the school has a racially discriminatory policy as to students.

"(b) PROCEDURE TO BE FOLLOWED BY THE SECRETARY.—Whenever the Secretary has reason to believe that a private school has a racially discriminatory policy as to students, the Secretary shall file a civil action for a declaratory judgment in the United States district court for the district in which the private school is located.

"(c) LIMITATIONS.—

"(1) Evidentiary standard.—No finding that a private school has a racially discriminatory policy as to students shall be made unless the Secretary, by a clear and convincing preponderance of the evidence, shows that the school has had a practice of deliberate and intentional racial discrimination in fact.

"(2) No adverse action until school has exhausted appeals.—In the case of a private school with respect to which a court has found under subsection (a) that it has a racially discriminatory policy as to students, the Secretary shall not take any action with respect to the initial qualification or continued qualification of the school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2)(B) until the school has exhausted all appeals from the final order of the district court in the declaratory judgment action brought under this section.

"(d) RETENTION OF JURISDICTION; REINSTATEMENT OF STATUS.—The district court before which an action is brought under this section which resulted in the denial of initial qualification or revocation of qualification of a private school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a), or as an organization described in section 170(c)(2)(B), shall retain jurisdiction of such case, and shall, upon a determination that such school—

"(1) has not had a racially discriminatory policy as to students for a period of not less than a full school year since such denial or revocation became final, and

"(2) does not have a racially discriminatory policy as to students.

shall issue an order to such effect and vitiate such denial or revocation. Such an order may be appealed by the Secretary, but, unless vacated, be binding on the Secretary with respect to such qualification.

"(e) Award of Cost and Fees to Prevailing School.—In any civil action brought under this section, the prevailing party, unless the prevailing party is the Secretary, may be awarded a judgment of costs and attorney's fees in such action.

"(f) DEFINITIONS.—For purposes of this section.—

"(1) Private school.—The term 'private school' means any privately-operated school which meets the requirements of State law relating to compulsory school attendance other than a school offering care or instruction for students solely below the first grade, nursery schools, schools for the blind or deaf, or schools operated solely for the handicapped or emotionally disturbed.

"(2) Racially Discriminatory Policy As To Students.—The term 'racially discriminatory policy as to students' means that a school does not admit students of all races to all the rights, privileges, programs, and activities generally accorded to or made available to students at that school, and that the school discriminates on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other school-administered programs. Such term does not include an admissions policy of a school which limits, or grants preferences or priorities to, its students to members of a particular religious organization or belief and does not include any policy or program of a school which is limited to, or required of, members of a particular religious organization or belief.

"(g) Section to Apply Only to Schools With Publicly Announced Policy of Nondiscrimination.—Subsection (a) shall not apply with respect to any private school unless that school has adopted a policy of nondiscrimination on the basis of race as to students and has published, in such manner as the Secretary may require, public notice of that policy.".

(b) The table of sections for such subchapter is amended by striking out the last item and inserting in lieu thereof the following:

"Sec. 7408. Action to revoke or deny tax-exempt status of private school on basis of racial discrimination "Sec. 7409. Cross references.".

SEC. 4. EFFECTIVE DATE.

The amendments made by section 3 of this Act shall apply to actions of the Secretary of the Treasury taken with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code, or which is described in section 170(c)(2)(B) of such Code, after the date of enactment of this Act.

Senator **Helms**. Now, Mr. Kurtz and Mr. Chairman, on Tuesday of this week, I introduced S. 995, entitled "The Private School Nondiscriminatory and Due Process Act of 1979." In sponsoring this legislation, I have been joined by Senators Ford, Schweiker, Stevens, and Zorinsky.

This bill provides that allegations of racial discrimination as to students in a private school must be determined by declaratory action suit brought by the Secretary of the Treasury in a Federal district court in the district in which the school is located.

This assures elementary due process to a private school, including adjudication by the constitutional branch of government well versed in determining, on the basis of evidence, whether an organization, in fact, is discriminating. And I hope that Mr. Kurtz will furnish a written statement to the committee, Mr. Chairman, outlining the views of the Service with regard to the provisions of S. 995.

Senator **Byrd**. Would you submit that for the record?

Mr. **Kurtz**. Yes, sir.

Senator **Byrd**. Thank you.

[The following was subsequently supplied for the record:]

INTERNAL REVENUE SERVICE COMMENTS ON S. 995

S. 995 would prohibit the Government from denying or revoking the tax exempt status of a private school because of racial discrimination without first obtaining a declaratory judgment that the school is racially discriminatory in the United States District Court for the district in which the school is located. Section (c)(2) of S. 995 would require the Secretary to prove to the court by a "clear and convincing preponderance of the evidence" that the school is racially discriminatory.

The Internal Revenue Service is opposed to S. 995.

Under the existing law, the Service first makes a final administrative determination; once that final administrative determination has been made, the taxpayer, or, in an exempt organization case, the organization claiming the exemption, can immediately seek judicial review. For organizations such as private schools claiming exemption under section 501(c)(3), once the Service has completed its administrative review and revoked or denied tax exemption (or fails to act within a 270-day period) the private school may bring a declaratory judgment action in court to challenge the adverse Service determination, or its failure to act. Internal Revenue Code § 7428. Moreover, in such a declaratory judgment action, the statute provides that even if the court upholds the revocation of exemption, contributors may continue to take tax deductions, within certain limits, for contributions made to the organization during the pendancy of the proceeding.

S. 995, on the other hand, would reverse current procedures and require the Service to obtain a federal court determination that racial discrimination has taken place in any and all cases before it could administratively deny or revoke exemption. Completion of the administrative review in such cases would therefore be conditioned on a final judicial determination. This would be a procedure completely unprecedented in the tax law.

We believe that the rights of organizations and contributors are already adequately protected under current provisions, allowing a declaratory judgment action after the Service has made its administrative determination, and that the reversal of these procedures prescribed by S. 995 is not warranted.

Moreover, the burden of proof specified under S. 995 which the Service would have to meet—"clear and convincing preponderance of the evidence"—is the level of proof required for civil fraud and certain extraordinary penalty-type excise tax provisions under the Internal Revenue Code. *See* Code § 7454(b), Tax Court Rule 142. In tax cases generally, the taxpayer or the organization claiming tax exemption must establish or verify entitlement to the particular tax benefit. The practical reason for this rule is because the taxpayer or the organization claiming exemption, not the Government, has the information necessary to support the proper determination. An organization applying for exemption must show sufficient facts in its application to demonstrate it is entitled to the exemption, and if questions are raised in the application process or on examination concerning a particular aspect of its operation, the organization must provide adequate clarifying information or risk that the determination may be made against it with respect to that issue.

Another major area of concern is section (f)(2) of the bill, which provides:

"The term [racially discriminatory policy] does not include an admissions policy of a school which limits, or grants preferences or priorities to, its students to members of a particular religious organization or belief and does not include any policy or program of a school which is limited to, or required of, members of a particular religious organization of belief."

The effect of this provision apparently could be to exempt many, if not substantially all, church-operated or sponsored private schools from the requirement that the schools be racially nondiscriminatory in order to qualify for tax exemption and tax deductible contributions. For example, so long as a school granted preference in admissions to members of a particular religious organization or belief, it would apparently be considered racially nondiscriminatory even if the school or the religious organization actually maintained an overt policy or racial discrimination and denied admission on the basis of race.

Permitting such religious schools to engage in racial discrimination and to retain tax exempt status could raise serious constitutional questions.

The current position of the Service, as published in Revenue Ruling 75-231, 1975-1 C.B. 158, is that the strong federal policy against racial discrimination in education applies to all private schools, including church-affiliated or sponsored schools, and such schools are subject to the same nondiscrimination requirement to qualify for tax exemption. The proposed procedure does recognize that some private schools may have special programs or characteristics which may be attractive only to particular groups, and not to certain minority groups, and permits this to be taken into account.

S. 995 would also pose a number of technical and other problems which we would be pleased to comment on further at an appropriate time.

Senator HELMS. Now, Mr. Kurtz, I may plow some of the ground that you already discussed, and others, but just to put it in a composite, I will ask a series of questions.

The U.S. Commission on Civil Rights has stated that it is the responsibility of the Internal Revenue Service to terminate the tax-exempt status of private schools on the basis of title VI of the Civil Rights Act of 1964. I assume that you agree with that?

[Pause.]

Mr. KURTZ. Actually——

Senator HELMS. I will be delighted if the answer is "no," you understand. [Laughter.]

Mr. KURTZ. How about if the answer is "maybe"?

Actually, what we are interpreting is section 501(c)(3) of the Internal Revenue Code, which we believe and the courts have said carries with it the overall requirement that an organization not violate sharply defined public policy. In the racial discrimination area, we are satisfied that there is a sharply defined national policy against racial discrimination going back 25 years.

Title VI, at least parts of title VI, are a part of the public policy in this country, but I would not want to endorse every provision of title VI as being a gloss on the Internal Revenue Code.

Senator HELMS. If we could proceed a bit further along these lines, the Commission has also recommended that the Service issue title VI regulations which define, in detail, the duties of all exempt private schools. Do you agree with that?

Mr. KURTZ. Regulations under title VI?

Senator HELMS. Yes, sir. Title VI regulations which define in detail the duties of all exempt private schools. Would you like to see a copy of the Commission's recommendations?

Mr. **Kurtz**. We have no intention at this time to issue regulations under title VI. We have no authority under title VI.

Senator **Helms**. Mr. Chairman, I do not want to take a lot of time on this issue. I only raise it because Mr. Kurtz mentioned the Commission's report in his testimony.

The Civil Rights Commission has also urged that the IRS issue similar regulations concerning title IX and other matters. Do you agree, Mr. Kurtz, that the Service is so authorized and, if so, has the Service taken any action to draft such regulations?

Mr. **Kurtz**. Let me say that I am not familiar with those precise recommendations.

Senator **Helms**. Let me say that I am not your adversary personally on this matter. If you would like to reflect upon these questions and respond to the committee and to me in writing, that would be fine.

Mr. **Kurtz**. I would be happy to do that.

Senator **Helms**. I do not want to put you on the spot this morning.

Mr. **Kurtz**. I would be happy to submit responses for the record. Let me say generally we have no authority and no inclinations to issue regulations under any provision of the Civil Rights Act. That is not within our domain.

The only effect the Civil Rights Act, or any other piece of legislation, would have on this area is the extent to which it may contribute to defining what public policy is for purposes of the charitable limitation of section 501(c)(3).

Senator **Helms**. All right.

In the preparation of your written response, you may want to consider page 5, paragraph 3, of your statement which you just have completed reading, since it refers to the Commission's recommendations.

Mr. Kurtz, in the 1977 case of *Green* v. *Blumenthal*, the Service argued against procedures similar to those it has now proposed. At that time, the Service maintained that it is apparent that many factors other than an intent to discriminate might account for a given school's establishment or expansion at a time of desegregation, and that the fact that a private school has an insubstantial minority enrollment may be accounted for on many grounds other than an attempt to discriminate.

Is that still the position of the Internal Revenue Service?

Mr. **Kurtz**. The revenue procedure does not assume conclusively that the formation or expansion of a school at or about the time of public school discrimination renders the school discriminatory and requires the removal of tax exemption. It is simply a factor. The revenue procedure would accommodate many explanations of why that has occurred.

Senator **Helms**. Mr. Chairman, I have several other questions. Are you going to have another round, or shall I submit these in writing.

Senator **Byrd**. Let me ask one or two questions, then I will yield again to you.

Senator **Helms**. I thank you.

Senator **Byrd**. Mr. Kurtz, does the Service believe that the Nation has already witnessed, or is about to witness, a substantial increase in racial discrimination on the part of private schools?

Mr. **Kurtz**. I do not know how to answer that question, Mr. Chairman. I do not know what the future holds, nor in any reliable statistical way, what has occurred in the past.

Senator **Byrd**. What is the situation today, in your judgment?

Mr. **Kurtz**. I think that we have seen situations where there are private schools which discriminate, but I do not believe that it is a pervasive problem and I cannot quantify it.

Senator **Byrd**. Is it pervasive, in your judgment?

Mr. **Kurtz**. I do not know.

Senator **Byrd**. Is there any authority under acts of Congress to require racial quotas?

Mr. **Kurtz**. For tax purposes, no. We do not, in this revenue procedure, establish racial quotas. We do not believe that would be appropriate.

Senator **Byrd**. You mentioned the 20 percent.

Mr. **Kurtz**. The 20 percent is not a quota, but rather a safe harbor. That is——

Senator **Byrd**. That is if the school has 20 percent minority enrollment it is assumed not to be discriminatory?

Mr. **Kurtz**. That is correct, for examination purposes.

Senator **Byrd**. Thank you, sir.

Senator Helms?

Senator **Helms**. You believe in due process, do you not, Mr. Kurtz?

Mr. **Kurtz**. Very strongly.

Senator **Helms**. Would you have any objection personally to a private school having its day in court before the IRS cuts off its money?

Mr. **Kurtz**. The law now so provides, Senator Helms, that any private school or other organization which either applies for exemption, and has it denied, or applies for exemption and the Service does not act, or has an exemption revoked, is entitled to go into the Tax Court, the District Court for the District of Columbia, or the Court of Claims to contest that determination, prior to its becoming effective.

If it is a revocation proceeding, as a matter of fact, contributions within certain limits can continue to be made to that school during the pendency of that action until it is final.

Senator **Helms**. The problem with that is it takes years and, as you say, there are limits on the contributions.

Mr. **Kurtz**. The deductibility of contributions, within certain limits, continues during the pending court action where the Service has revoked a prior exemption ruling.

Senator **Helms**. As Senator Byrd says, you put the schools in the position of having to prove themselves innocent. For example, the proposed revenue procedure speaks of requiring private schools to adopt minority curriculum and programs.

Mr. **Kurtz**. No, sir, it does not require the schools to do anything specific. I think what you are referring to are illustrations of actions which a school might undertake which might be indicative that the school does not have a racially discriminatory policy.

Senator **Helms**. You acknowledge that implicitly as a requirement?

Mr. **Kurtz**. No; I do not. It is not a requirement.

Senator **Helms**. You ought to see some of your people on a local level in action.

Mr. **Kurtz**. That is why we have provided for national office review in all of these cases, to make sure that the procedure is applied the way it reads, that is, that they are not requirements.

Senator **Helms**. Mr. Kurtz, would you explain where the Internal Revenue Service gets its authority to dictate particular curricula for private schools?

Mr. **Kurtz**. We do not dictate curriculum and do not have the authority to do so.

Senator **Helms**. You do not even imply it?

Mr. **Kurtz**. No.

Senator **Helms**. Is there any statutory authority by which the IRS may require an affirmative action program on the part of a private school?

Mr. **Kurtz**. Well, in particular situations the Federal courts have held that the circumstances surrounding the school's formation may require it to undertake activities which are designed to overcome the presumption of discrimination created by the circumstances of its formation.

In those particular circumstances, if you want to call that an affirmative action program, we feel we may, in those circumstances, be required by Federal courts to look at that, yes.

Senator **Helms**. Mr. Kurtz, do you not see the tapestry that you are drawing?

Mr. **Kurtz**. I do see the tapestry I am drawing. I think it is a different one, Senator Helms, if I may say so, from the one that you are seeing.

Senator **Helms**. It decidedly is. If such affirmative action programs are not to be applied to all new schools, how do you explain the language in sections 6 and 4 regarding applications for tax-exempt status—which states that a school will be considered to have a racially nondiscriminatory policy if it can show that it has undertaken actions and programs reasonably designed to attract minority students.

Mr. **Kurtz**. What was the question?

Senator **Helms**. The question is this: You say you do not impose, implicitly or otherwise, an affirmative action program?

Mr. **Kurtz**. I did not say that affirmative action programs may not be appropriate in certain cases. Those are cases where the circumstances of the school's formation are related to public school desegregation. Those are requirements which have been imposed by Federal courts in other cases, *Norwood* v. *Harrison*, for example. These rules are developed out of court cases defining what constitutes segregation in private schools.

Senator **Helms**. Mr. Kurtz, I do not question your good faith one bit; you understand that, do you not?

Mr. **Kurtz**. Yes, sir.

Senator **Helms**. If we can operate on that understanding, then we can get along.

To follow up what you just said, while a currently exempt school may appear to have an alternative to affirmative action in the matter of overcoming the presumption of discrimination, do not the procedures really limit the conclusions which may be made from the evidence presented by the schools?

Mr. KURTZ. No. We assume, in particular cases, that all of the facts will be looked at in making this determination. I might say that the Service gains no advantage by claiming that a school, or any other organization, is not entitled to tax exemption because that issue ultimately will be decided by the courts.

We have no interest in dragging people through the courts. We have no interest in losing cases, and the ultimate judgment on whether a school is entitled to tax exemption will be based on the court decisions.

We believe that the revenue procedure attempts to put forth, in some way capable of uniform application, a distillation of what we believe courts have decided up until this time. We will have to look at cases as they come along and decide whether we are right. We believe that these are an accurate representation of where the courts are today.

Senator HELMS. Mr. Chairman, I have no more questions if the Commissioner would expand in writing his answers to several of the previous questions as we discussed earlier.

Mr. KURTZ. We would be pleased to respond, Senator Helms.

[The following was subsequently supplied for the record:]

COMMISSIONER OF INTERNAL REVENUE,
Washington, D.C., June 27, 1979.

Hon. JESSE A. HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: At the April 27 hearing on the proposed IRS procedure regarding racial discrimination and private schools, before the Subcommittee on Taxation and Debt Management, you asked me several questions regarding the applicability of Title VI and Title IX of the Civil Rights Act to the Service's administration in this area.

As you indicated, the Civil Rights Commission, in a 1975 report, recommended that the Service issue regulations under Title VI and Title IX implementing the requirements of those statutes in the administration of the tax laws governing tax exemption.

The Service has not issued such regulations, and there are no current plans to do so.

I trust this is responsive to your concern, and if we can provide you with any further information, please let me know.

With kind regards,

Sincerely,

JEROME KURTZ.

Senator HELMS. If I could have one moment for comment?

Senator BYRD. Go ahead.

Senator HELMS. We are witnessing in this country a deterioration of the quality of education. I think that this decline is undeniable in the public schools. Every measurement that is available to me points to it.

Here we have the anomaly of citizens of this country sacrificing, doing the best they can, doing without, in order to create schools which will offer an educational opportunity for their children while, at the same time, these parents are paying taxes to finance the Government schools. The Internal Revenue Service ought to have higher priorities than to harrass and intimidate, by implication or otherwise, these schools in order to enforce a self-styled public policy promoted without congressional authorization or direction.

I have personal knowledge of several of these schools in my State and I know the intent, and I know the good faith of the people, and now they live under the threat of going to enormous expense to prove themselves innocent.

Now, Mr. Chairman, I would feel a little bit better about these procedures if we had, in effect, legislation that you and I have often talked about, legislation to provide that when the U.S. Government—meaning the bureaucrats—bring actions against private citizens and lose, that these private citizens be reimbursed the cost of defending themselves. And I would feel a lot better about these procedures if they did not turn due process on its head by requiring people to prove they are innocent.

I hope that my legislation to clearly define the role of the Service in these matters will be favorably considered by the Senate and the House of Representatives. Whether it is or not, I hope, Mr. Kurtz, that you really will be very careful about what you are doing, or those operating in your name are doing, to a very worthwhile enterprise in this country.

I appreciate your coming here this morning. I appreciate your responding to my questions.

Mr. **Kurtz**. Thank you, Senator Helms.

Senator **Byrd**. To follow up on Mr. Helms' statement, you do have tremendous power. As a fellow Virginian, John Marshall, once put it, "The power to tax involves the power to destroy." I have had a number of conversations with you, and I am much impressed with you. I just wanted to express the view that I hope that the Internal Revenue Service will not become involved in politics. At one time, in another administration, there were charges along that line, and I think would be a very tragic thing if the Service did become involved in politics.

I feel confident that, with you, it will not.

I want to thank you for being here today.

Mr. **Kurtz**. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Kurtz follows:]

STATEMENT OF JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear here today to discuss the revised revenue procedure proposing guidelines to implement the Service's obligation to limit tax exemption to private schools that operate on a racially nondiscriminatory basis.

The tax issue is a private school's entitlement to Federal tax exemption under section 501(c)(3) of the Internal Revenue Code. In addition to exemption from Federal income tax, qualification under this section allows contributions made to the organization to be tax deductible by the donors as charitable contributions under section 170(c)(2)(B) of the Code.

Section 501(c)(3) exempts organizations "organized and operated exclusively for religious, charitable, . . ., or educational purposes." An educational organization is not exempt under this section if it operates illegally or contrary to public policy. Racial discrimination in education is contrary to well established public policy. Under the law, the Service has an obligation to deny tax exemption to private schools that are racially discriminatory.[1] Under the Code, a school is entitled to judicial review of any adverse IRS determination on exempt status. In the case of a court proceeding on a revocation, even if the revocation is judicially upheld, individual contributors may deduct contributions up to $1,000 until the date of the court's decision.

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[1] *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971); *Prince Edward School Foundation* v. *Commissioner*, No. 78-1103 (D.D.C., filed April 18, 1979); Rev. Rul. 71-447, 1971-2 C.B. 230.

It may be useful to describe the history of the Service's involvement with racial discrimination by private schools claiming tax exemption.

Racial discrimination in public education was ruled illegal and contrary to public policy in the 1954 Supreme Court decision of *Brown* v. *Board of Education.*[2]

In 1967, the Service announced the position that racially discriminatory private schools receiving state aid were not entitled to tax exempt status.[3]

Prior to 1970, however, the Service recognized as tax exempt racially discriminatory private schools that were not receiving state aid. That policy was challenged when the Service was sued by a number of black parents in Mississippi who asserted that no private school discriminating on racial grounds should be entitled to tax exempt status. In 1971, a three-judge Federal court in the case of *Green* v. *Connally*[4] held that racially discriminatory private schools are not entitled to tax exemption under section 501(c)(3). The decision would apply to a school without regard to whether it was receiving state aid. The Supreme Court affirmed that decision.

During the *Green* v. *Connally* litigation, the Service announced its position that racially discriminatory private schools are not entitled to tax exemption.[5] The *Green* decision took note of that position and went on to conclude that it was not only appropriate, but legally required. The *Green* court placed the IRS under a permanent injunction to deny tax exemption to schools in Mississippi that racially discriminate. The court also ordered the IRS to implement this order with regard to private schools located in Mississippi, the particular schools subject to the action, by requiring these schools to adopt and publish a nondiscriminatory policy, and to provide certain statistical and other information to enable the Service to determine if the schools are racially discriminatory. The Service examined private schools in Mississippi and, applying similar procedures nationwide, revoked the exemption of a number of schools that would not state that they had a nondiscriminatory policy.

Since 1970 and the *Green* decision and injunction, the Service has taken a number of steps to implement the nondiscrimination requirement. In 1971, the Service published and explained generally the nondiscrimination requirement.[6] In 1972, the Service published a Revenue Procedure[7] setting forth guidelines for certain private schools claiming tax exemption to publicize a racially nondiscriminatory policy. That procedure provided several examples of methods by which publication could be made, but did not require the use of any particular method.

In 1975, the U.S. Commission on Civil Rights criticized the absence of specific guidelines to identify schools which should be examined and to determine whether schools are discriminatory.

The Service then published revenue procedure 75-50,[8] which required all tax exempt private schools to adopt formally a nondiscriminatory policy; to refer to this policy in all brochures and catalogues; and, generally, to publish notice of this nondiscriminatory policy annually in a newspaper or by use of the broadcast media. In comments submittedon that procedure, the Civil Rights Division of the Department of Justice recommended that the Service adopt stronger guidelines focusing on a private school's history with respect to public school desegregation as well as its asserted policies.

The Service also published a Revenue Ruling in 1975[9] clarifying its position that private schools operated by churches, like other private schools, may not retain tax exemption if they are racially discriminatory. A 1977 district court decision is in accord with this position.[10] Another district court in the same circuit recently held that a particular private school, Bob Jones University, was a religious organization not subject to the nondiscrimination requirements applicable to educational institutions.[11] The government considers this decision to be wrong, and is appealing it.

In 1976, the Supreme Court decided the case of *Runyon v. McCrary*[12] which involved a proprietary, nonsectarian school that denied admission to blacks. The

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[2] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[3] IRS News Release, August 2, 1967.

[4] *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971).

[5] IRS News Release, July 10, 1970.

[6] Rev. Rul. 71-447, 1971-2 C.B. 230.

[7] Rev. Proc. 72-54, 1972-2 C.B. 834.

[8] Rev. Proc. 75-50, 1975-2 C.B. 587.

[9] Rev. Rul. 75-231, 1975-1 C.B. 158.

[10] *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977).

[11] *Bob Jones University v. United States*, No. 76-775 (D.S.C. filed Dec. 26, 1978).

[12] *Runyon v. McCrary*, 427 U.S. 160 (1976).

Supreme Court held that the 1866 Civil Rights Act made it illegal for the school to deny admission to blacks. This decision would apply to a school without regard to whether it receives any Federal or State aid. The *Runyon* decision amplifies the strong public policy against racial discrimination in private schools and thus further supports the Service position that private schools that discriminate on racial grounds are not entitled to tax exemption under section 501(c)(3).

In 1976, the plaintiffs in the *Green* case reopened that suit, asserting that the Service was not complying with the court's continuing injunction that Mississippi private schools which are racially discriminatory be denied tax exemption. In addition, a companion suit was filed, *Wright* v. *Blumenthal*, asserting that the Service's enforcement of the nondiscrimination requirement on a nationwide basis was ineffective. These two cases are now pending before the court.[13]

This litigation prompted the Service once again to review its procedures in this area. It focuses our attention on the adequacy of existing policies and procedures as we moved to formulate a litigation position. We concluded that the Service's procedures were ineffective in identifying certain schools which in actual operation discriminate against minority students, even though the schools may profess an open enrollment policy and comply with the yearly publication requirement of Revenue Procedure 75-50.

A clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. This position is indefensible. Just last year, the U. S. Commission on Civil Rights criticized the Service's enforcement in this area as inadequate, emphasizing the continuing tax exemption of such adjudicated schools.

The effect of current IRS procedures has been that the tax exemption of a school which adopts a nondiscriminatory policy in its governing instrument and publishes it annually will likely remain undisturbed unless some overt act of discrimination comes to the attention of the Service.

Racial discrimination takes many forms. In the clearest cases, a school may have a stated policy of racial discrimination or may have turned away minority student applicants on racial grounds. The Service's existing guidelines would call for denial of exemption in such cases.

However, Federal courts have also carefully scrutinized schools which while having a stated policy of nondiscrimination, were formed or substantially expanded at or about the time of public school desegregation in the community served by the school. Courts have held such schools discriminatory if the formation or expansion of the school was related in fact to public school desegregation, the school has an insignificant number of minority students, and the school has not taken active steps sufficient to convey to the minority community that minority students are welcome.[14]

Of course not all schools that discriminate racially have been adjudicated discriminatory by a court or agency; and the Service must conduct its own examinations in this area. In examining a nonadjudicated school, the Service should apply standards consistent with those used by courts in adjudicated racial discrimination cases.

After reviewing the court decisions, the standards used in those decisions, and our existing guidelines, we concluded last year that more specific guidelines were needed to focus on certain schools' actual operations to verify if their actual practices conformed to their asserted policies.

Last August, the Service published, in proposed form, a revenue procedure providing guidelines to be used in reviewing a school's racial policy.

Many public comments were received and on December 5 through 8, we conducted a public hearing on the proposal. After reviewing the written and oral comments, we made substantial revisions in the proposal and issued it on February 9, again in proposed form, inviting written public comment. The comment period ended April 20 and we are now studying the suggestions made.

The revised proposed procedure was designed to enable us to identify those racially discriminatory schools that we have had difficulty identifying under existing procedures. At the same time, the revised procedure was designed to avoid problems presented by the earlier proposal, which was not sufficiently flexible to take account of all relevant factors. The revised proposal gives greater weight to each school's particular circumstances, to avoid administrative denials of exemption to schools that are not in fact racially discriminatory. Discretion to take account of all relevant circumstances is essential to making accurate determinations in this area.

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[13] *Green* v. *Blumenthal*, No. 1355-69, (D.D.C.); ***Wright*** v. ***Blumenthal***, No. 76-1426 (D.D.C.).

[14] *Norwood v. Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974); ***Brumfield v. Dodd***, 425 F. Supp. 528 (E.D. La. 1977).

The earlier proposal would generally have classified a school formed or substantially expanded at the time of public school desegregation as "reviewable" if its percentage of minority enrollment was less than 20 percent of the percent of school age minorities in the community. Such schools would have been required to show, by the existence of at least "four out of five" specific factors, that the relatively low level of minority enrollment was not due to racially discriminatory policies.

The new proposal would not classify a school as "reviewable" unless the school meets three criteria. First, it must have been formed or substantially expanded at the time of public school desegregation in the community served by the school; second, it must have insignificant minority student enrollment; and third, its creation or substantial expansion must be related in fact to public school desegregation in the community.

Whether a school has significant minority student enrollment depends on the school's particular facts and circumstances. For example, we modified the earlier proposal to provide that consideration will be given to any special circumstances limiting the school's ability to attract minority students, such as an emphasis on special programs or curricula which by their nature are of interest only to identifiable groups that lack a significant number of minority students, so long as such programs or curricula are not offered for the purpose of excluding minorities. In addition, we provide a safe harbor guideline—a school that meets the "20 percent test" is considered to have significant minority enrollment and will thus not be reviewable.

Whether a school's formation or expansion was related in fact to public school desegregation also depends on all the circumstances. The proposal contains illustrative factors to be considered in making this determination. For example, whether or not the students enrolling in the private school were drawn from the public schools undergoing desegregation would be a relevant factor in making this determination.

A school classified as "reviewable" under the new procedure will be considered racially discriminatory unless it has undertaken actions and programs reasonably designed to attract minority students on a continuing basis. The new proposal does not require "four out of five" specific types of actions to be taken in every case, but rather provides flexibility for the particular school to take action appropriate in its circumstances. This proposal contains examples of actions that a school might take. Some critics of the proposal have suggested that all reviewable schools would be required to take all the steps listed in the proposal in order to be tax exempt. This is not what the proposal provides. Those actions and programs are simply examples of actions and programs that could be reasonably designed to attract minority students on a continuing basis.

To help assure that the procedure is being correctly and consistently applied, the new procedure provides for National Office review of all applications for exemption and of all examinations of private elementary and secondary schools. All actions, favorable or unfavorable, will be reviewed in the National Office. A school is also entitled to judicial review of any adverse Service action.

The Internal Revenue Service must make administrative decisions one way or the other regarding the tax exempt status of private schools. If we take no action in this area, that itself is a decision. We proposed this Revenue Procedure as a reasoned response to the need for standards under which decisions can be made which are correct and defensible in litigation. The Service will administer the standards fairly and responsibly.

Senator **Byrd**. The next witness is Hon. Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights.

Welcome, Mr. Flemming. We are glad to have you.

STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS

Mr. **Flemming**. Chairman Byrd, members of the subcommittee, I am Arthur S. Flemming, Chairman of the United States Commission on Civil Rights. I appreciate the opportunity to appear before you this morning.

As you know, the Commission on Civil Rights has been in continuous existence for over two decades. During more than half of the Commission's life, we have been extremely concerned with the

Federal Government's tax policies respecting private schools whose operations conflict with the national policy of eliminating segregated education.

In 1967, the Commission published a report entitled "Southern School Desegration 1966-67" which reviewed the progress of Southern and border-State school districts in complying with the *Brown* decision. In assessing Southern school desegregation, we also examined the development of private schools to circumvent public school desegregation. The 1967 report concluded:

> Many private segregated schools attended exclusively by white students have been established in the South in response to public school desegregation. In some districts such schools have drained from the public schools most or all of the white students and many white factulty members.

The Commission noted that many of the racially segregated private schools established in the South to circumvent public school desegregation had been accorded tax-exempt status by the Internal Revenue Service, and that Federal tax exemptions constituted a form of indirect Government assistance. Accordingly, the Commission recommended that the Secretary of the Treasury request an opinion of the Attorney General as to whether Federal law "authorizes or requires the Internal Revenue Service to withhold tax benefits presently being afforded by the Service to racially segregated private schools. * * *"

In June 1971, a three-judge Federal District Court panel ruled on the merits of a suit by black Mississippi parents against the IRS to prevent the Service from granting tax exemptions to private schools in that state established as an alternative to desegregated public schools. During the litigation but prior to the court's decision in *Green* v. *Connally*, the IRS announced that:

> It can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.

The service's new policy was based upon its interpretation that an organization practicing racial discrimination could not be considered "charitable" in the common law sense and therefore, racially segregated private schools could not qualify for exemption under the Internal Revenue Code.

In *Green*, the court reaffirmed the service's interpretation of the code as barring tax exemptions and deductions for charitable contributions made to racially discriminatory private schools. Such an interpretation was not only warranted by the common law of charitable trusts, according to the court, but also was necessary if the Internal Revenue Code was to be administered "in consonance with the Federal public policy against support for racial segregation of schools, public or private."

Although the court in *Green* upheld the policy of IRS respecting nondiscrimination by tax exempt schools, it found that the Service's procedure for enforcing that policy was not sufficient to adequately protect the rights of plaintiffs in the case. The court stated:

> The history of state established segregation in Mississippi, coupled with the founding of new private schools there at times reasonably proximate to public school desegregation litigation, leaves private schools in Mississippi carrying a badge of doubt.

Accordingly, the court permanently enjoined the IRS from granting or continuing to recognize the tax exempt status of Mississippi private schools until the IRS first affirmatively determined, on the basis of objective racial data, that the schools are operated in a nondiscriminatory manner. In setting forth detailed procedures for the IRS to follow with respect to applications for tax-exempt status by Mississippi schools, the court emphasized that it was not "laying down a special rule for schools located in Mississippi."

> The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class.

In 1973 and again in 1975, the U.S. Commission on Civil Rights published reports on the Federal civil rights enforcement effort, which included an evaluation of activities of the Internal Revenue Service. Both reports identified serious and pervasive deficiencies in the Service's approach to nondiscrimination enforcement with respect to the provision of tax-exempt status to private schools. Despite the holding of *Green* that the practice of discrimination disqualifies a private school for tax exempt treatment under the Internal Revenue Code, the Commission found that the Service had revoked the tax exemptions of few segregated schools.

Since 1970, when the IRS first adopted the position that racially discriminatory schools cannot legally qualify for preferential tax treatment under the code, the Service has revoked the tax exempt status of only 107 private schools. The vast majority of these revocations resulted from the open refusal of certain private schools to abide by the IRS's formal requirements pertaining to adoption and publication of nondiscriminatory admissions policies.

On August 22, 1978, the IRS published a proposed "Revenue Procedure on Private Tax-Exempt Schools" containing new guidelines the Service would apply in determining whether certain schools, which in the words of the *Green* decision "carry a badge of doubt," legally qualify for tax-exempt treatment. Following public comments on the August proposal, the Service published a revised proposed Revenue Procedure on Private Schools in February of this year. The Commission has provided comments to the IRS on both proposed Revenue Procedures. These comments support the basic position taken by the IRS and are designed to strengthen its role in dealing with this very important issue.

In concluding my prepared testimony, I would like to comment briefly on S. 103 and S. 449. Both measures have been referred to the Senate Committee on Finance for consideration, and both bills directly relate to the substantive matters I have addressed this morning.

S. 103 would prohibit the IRS, during calendar years 1979 and 1980, from issuing in proposed or final form regulations, revenue procedures, revenue rulings or other guidelines for determining whether educational institutions claiming tax exemption under section 501(c)(3) of the Internal Revenue Code are operating on a racially nondiscriminatory basis. The Commission opposes this legislation on the grounds that it would bar the IRS from taking actions which the Service may determine necessary to fulfill its constitutional and statutory civil rights enforcement responsibilities.

The IRS is currently the defendant in a Federal suit which challenges the legal adequacy of the Service's present procedures and policies respecting nondiscrimination by private schools. If this legislation were enacted, the Service could not institute new policies and practices which the Federal courts might require. Such a restriction could, therefore, provoke a constitutional confrontation between the three branches of the Federal Government. Such a confrontation would involve not only the doctrine of separation of powers but also would directly relate to the manner in which the executive branch carries out its substantive constitutional obligations.

S. 449 would amend the Internal Revenue Code to specify that exemptions provided to organizations under Section 501(c)(3) and deductions for contributions to organizations that are tax-exempt under section 501(c)(3) shall not be construed as as the provision of Federal assistance. It is the position of this Commission that a Federal tax exemption is a privilege that confers financial benefits and thus constitutes an indirect form of Federal assistance. We believe that our position in this matter not only accords with fact but also is essential for effective implementation of the Federal policy against support of racial discrimination. In our view, S.449 legislatively contravenes fact and would, if enacted, seriously hamper civil rights enforcement. Accordingly, the Commission opposes this bill.

Senator **Byrd**. Thank you, Mr. Flemming.

Does the Commission believe that the Nation has already witnessed, or is about to witness, a substantial increase in racial discrimination on the part of private schools?

Mr. **Flemming**. The Commission hopes that we are not going to witness a substantial increase in discrimination on the part of the private schools. We do feel, however, that wherever discrimination exists, that that school should not be accorded the privileges of tax exemption.

Senator **Byrd**. I would like to say, as chairman of this committee, that I likewise believe the same thing and agree with you precisely on that point.

Does the Commission have evidence that there is an increase in racial discrimination in the private schools?

Mr. **Flemming**. The statistical evidence on this particular matter, is not satisfactory. I have listened to the testimony on the part of the Commissioner of the Internal Revenue. He indicated that they did not have statistical information along this line.

The Department of Health, Education, and Welfare likewise does not have statistical information along this line. What factual information we do have does indicate that the issue to which these revised procedures are addressed is a real issue.

Senator **Byrd**. You mentioned that a tax exemption is a Federal subsidy. Some of my Senate colleagues take the same view, calling it a tax expenditure.

That appears to me to be the philosophy that whatever a person earns belongs to the Government and whatever he is able to keep is only because the Government permits him to do so.

Is that your philosophy?

Mr. **Flemming**. No, Mr. Chairman. I would respond in the same way that the Commissioner of Internal Revenue did. I think that our philosophy is described quite accurately by the court in the *Green* decision where the Judge said:

> Clearly the Federal Government could not, under the Constitution, give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would be difficult indeed to establish that such support can be provided consistently with the Constitution.

Senator **Byrd**. Thank you, Mr. Flemming.

I want to say again that where there is discrimination in the private schools, or by private schools, then I think that the tax exempt status should be denied. I do not think, however, that the government should assume that all schools are discriminating until they prove otherwise. I suppose that is where you and I somewhat differ.

Mr. **Flemming**. Not necessarily. It seems to me that the procedures that are being proposed by the Commissioner of Internal Revenue do not proceed on that assumption. They say where certain factual situations exist, as far as the private schools are concerned, those situations raise a presumption and place upon the private school the obligation of presenting to the Commissioner of Internal Revenue evidence to rebut the presumption. Then the procedure outlines the kind of evidence that they would regard as acceptable. It seems to me that that is consistent with the normal procedures that are followed by the Internal Revenue Service.

Senator **Byrd**. Do you favor or oppose the quota system?

Mr. **Flemming**. This Commission has always taken the position that it is opposed to quotas in the area of affirmative action. We have put out a basic policy statement on affirmative action where we deal with the development of goals, the development of timetables, the development of action plans designed to bring about the achievement of timetables and the "good faith" efforts required to achieve the goals within the time set by the time tables.

We do not feel that the use of the 20 percent that is used in this proposed procedure constitutes a quota. I would concur wholeheartedly in Commissioner Kurtz's response to that question earlier in this hearing.

I appreciate the fact that there are differences of opinion on that, but after all, the Internal Revenue Service is not going to deny tax exemption on the basis of the 20-percent figure. Where that figure is not met, they provide the school with the opportunity of presenting additional evidence.

It is conceivable that a school could continue to have tax exemption on the basis of the evidence that it presented and still have an enrollment below the 20-percent figure. There is nothing absolute about that 20-percent figure at all. In that sense, we do not regard it as a quota.

Senator **Byrd**. I am glad to get your view in opposition to quotas. I am not sure there is much difference between quotas and goals.

Mr. **Flemming**. I will be glad——

Senator **Byrd**. It is a question of phraseology.

Mr. FLEMMING. We have worked on this in the area of equal employment opportunities and it seems to me that there is quite a difference. I grew up at a time when quotas were very much in vogue as far as certain minorities in this country were concerned and where educational institutions would say, for example, that they would admit up to a certain number of persons from, for example, the Jewish community, and no more. That was a quota, saying we will go this far and no further.

In terms of the goals that are established under the goals of affirmative action, the test of whether or not an employer is living up to an affirmative action plan is whether or not, in good faith, that employer is pursuing an action program designed to help achieve the goal within the timetables that have been set.

The goal is never looked upon as an absolute figure, and certainly there is nothing suggested by the concept of a goal that would suggest that the employer stops at that particular point. If he reaches that, and goes beyond, that is great. Everybody will be very encouraged if the employer goes beyond the goal.

When I was growing up and going to college, I was very much aware of the existence of quotas as they applied to the members of the Jewish community. I resented and opposed them then, and I still resent them and would oppose them with all the vigor that I have.

Senator BYRD. I will join you with equal vigor—if I have equal vigor as you do, I will join you in that endeavor to oppose quotas wherever they exist, for whatever reason they exist. I just do not believe in quotas. There are some individuals who do, and that is all right.

Mr. FLEMMING. I think, Mr. Chairman, if you had the opportunity of examining the Civil Rights Commission statement on affirmative action you would see that it is very consistent with the position that I have taken, and in that particular statement, we make it clear that we are unalterably opposed to the concept of quotas.

Senator BYRD. Thank you.

Mr. FLEMMING. You are welcome. It was a privilege to appear here before you.

Senator BYRD. I am delighted to have you and your associates.

Mr. FLEMMING. I did not identify my associates. Mrs. Lucy Edwards, in charge of our congressional liaison activities and Mr. James Lyons, her associate.

Senator BYRD. We are glad to have both of you.

The committee is pleased to have now my colleague from Virginia, Senator Warner.

Welcome, Senator Warner. I am glad to have you.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. I shall be very brief.

I would like to request the committee's leave to include in the record a statement of my viewpoints.

Senator BYRD. Yes; it will be included.

Senator WARNER. I would just like to say basically that my philosophy coincides precisely with what I have heard this morning as expressed by the chair, and that I want the opportunity, as do other Members of the Senate, to express my viewpoints with respect to the current Internal Revenue rulemaking procedures regarding the tax-exempt status of private schools, and particularly religious schools. Thank you, Mr. Chairman.

Senator BYRD. Thank you, Senator Warner. I am glad you were here today.

[The prepared statement of Senator Warner follows:]

STATEMENT OF SENATOR JOHN W. WARNER

Mr. Chairman, America's private elementary and secondary schools are an invaluable national asset. These institutions currently provide quality educational training to 5 million young Americans. Raising and utilizing some $9 billion in nongovernmental capital, private schools add diversity, depth and latitude to America's educational system.

It has been a long standing national policy—derived from the Constitution of the United States—to exempt private schools from federal taxation and to allow federal tax deductions for contributions to such schools.

Now, the Internal Revenue Service is proposing a revised Revenue Procedure which casts doubt on—perhaps even would reverse—this time honored national policy.

Mr. Chairman, I have no tolerance for those who would practice any form of racial discrimination. Accordingly, I am in full agreement with the Internal Revenue Service's definition of "racially nondiscriminatory policy as to students" set forth in Section 3.01 of its proposed new procedure: ". . . the school admits the students of any race . . . and . . . does not discriminate on the basis of race . . ."

Unfortunately, the new Revenue Procedure proposed on August 22, 1978 and revised on February 9, 1979 does not square with the Section 3.01 standards for nondiscriminatory policy. Therefore, for this and other reasons, I oppose the adoption of the proposed Revenue Procedure.

The crucial point to recognize is that racial nondiscrimination and racial balance are not one and the same.

School administrators, although practicing open admissions policies, cannot always guarantee acceptance of their programs by the various minority communities. The converse is true in schools whose enrollment is predominantly from within a particular minority community; such schools cannot always guarantee that their programs will attract a sufficient number of students from other racial, ethnic or national-origin groups.

The proposed Revenue Procedure, in many cases, would shift the burden of proof from the Internal Revenue Service to individual private schools.

Under the proposed procedure, the ultimate test of compliance is the school's ability to meet an arbitrary racial quota for enrollments: "a school will be considered to have significantly minority student enrollment if its percentage of minority students is 20 percent or more of the percentage of the minority school age population in the community served by the school."

This numerical quota is the "bottom line" for the IRS; and, in my judgment, it is clearly inconsistent with the IRS' own definition of nondiscriminatory school policy as stated in Section 3.01.

Mr. Chairman, the presumption of innocence is an American tradition mandated by the due process clause of our Constitution. I believe that schools should be clothed with that presumption of innocence, and judged by their own positive records in admissions policies—rather than being presumed guilty unless they purge themselves by complying with a rigid, arbitrary, bureaucratically-dictated, racial quota system.

Mr. Chairman, the IRS is charged with collecting the revenues necessary to operate our government. In this instance, the Service is establishing national guidelines on a subject that has nothing to do with raising revenue. I submit that the IRS should concentrate on a subject with which they are more familiar. Clearly, the responsibility for establishing the tax exempt status of private schools lies with the Congress.

In summary, the proper goal of prohibiting any racial discrimination in the admission policies of private elementary and secondary schools does not give the Internal Revenue Service unlimited administrative power. Private educational institutions must be afforded the protection granted by long standing national policy and the constitutionally mandated protection of presumption of innocence.

For these reasons, Mr. Chairman, I vigorously support S. 103 and S. 449—legislation which, if enacted, would forestall this unwarranted bureaucratic intrusion into private elementary and secondary education.

I thank you for your courtesy.

Senator BYRD. The next witnesses will be a panel of four: Mr. Richard Larson, staff council, American Civil Liberties Union; Mr. Robert S. McIntyre, director, Tax Reform Research Group; Mr. Charles A. Bane, co-chairman, Lawyers' Committee for Civil Rights Under Law; and Mr. Eric Schnapper, staff counsel, Legal Defense Fund, NAACP.

Welcome, gentlemen. The committee is glad to have you. There is a time limitation of 20 minutes, and you gentlemen can divide it up as you wish. I understand that you probably want 5 minutes apiece, but work it out any way you wish.

Mr. LARSON. Mr. Chairman, I am Richard Larson; I am with the ACLU. We have not discussed how to proceed. If nobody objects, I will go first, and I will be brief.

Senator BYRD. Unless you want to divide it otherwise, suppose each witness will have 5 minutes.

STATEMENT OF RICHARD LARSON, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. LARSON. Initially, in response to Senator Packwood's remarks, I appreciate the sentiments expressed with regard to the ACLU, but we of the ACLU believe if the Government is going to tilt on this question, it should tilt against Government support of racial discrimination.

The ACLU supports the IRS's proposed revenue procedure on private, tax-exempt schools and accordingly opposes S. 103 and S. 449.

Our perspective is a constitutional perspective. We believe that the IRS procedure not only is consistent with well-established constitutional principles but, in fact, is required by those constitutional principles.

First, constitutional principles make clear that no Government agencies may confer governmental economic benefits upon racially discriminatory entities. These principles require the IRS to deny tax-exempt status to discriminatory private schools.

Second, constitutional principles also make clear that the basic criteria for determining unconstitutional discrimination are racial statistics and chronological events. These principles require the IRS to presume to be discriminatory those private schools with little or no minority enrollment, which were created or expanded at the time of public school desegregation.

The IRS proposed revenue procedure basically comports with these constitutional principles. In a sense, it does not go far enough. It is more lenient than constitutional principles.

As Mr. Kurtz indicated this morning, the IRS has long failed to satisfy these constitutional obligations. Now that the IRS finally, at long last, proposes to comply with the Constitution, the IRS should not be delayed or prevented from doing so by this Congress.

Accordingly, we oppose the bills that have been referred to the subcommittee.

With that, I will pass to my colleagues.

Senator BYRD. Thank you, Mr. Larson.

STATEMENT OF RICHARD KOHN, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. KOHN. I would like to extend the apologies to the committee of Mr. Bane, who could not be here today. My name is Richard Kohn, staff attorney for the Lawyers' Committee for Civil Rights Under Law.

The Lawyers' Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights for all Americans. For a decade, we have been engaged in litigation to require IRS to implement the principles of *Brown* v. *Board of Education* that segregation by race in the public schools is antithetical to the fourteenth amendment. The decision in *Brown* triggered all manner of evasive tactics, ranging from massive resistance to subtle forms of indirect governmental aid to private discrimination. The creation and expansion of private schools for the purpose of undermining efforts to desegregate the public schools was expressly addressed by the Supreme Court in *Norwood* v. *Harrison* which struck down a program of State textbook aid to White Citizens Council schools.

Speaking for the full court, Chief Justice Burger said:

> Racial discrimination in state-operated schools is barred by the Constitution and it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

In 1969, we filed a suit against the IRS because it was apparent that, through the practice of granting tax exemptions to private segregated schools, the Federal Government was in the extraordinary position of undermining efforts to desegregate the public schools. As the result of that litigation, it is now the law of the land that private schools which practice racial discrimination are not entitled to tax exempt status.

This was established in *Green* v. *Connally,* and affirmed by the Supreme Court in *Coit* v. *Green.* Moreover, the fact that a school is church related is not a basis for exception, which was established in *Goldsboro Christian Schools* v. *United States.* We believe these underlying principles that you have stated this morning are not in dispute.

What is at issue is the administrative mechanism by which the clear mandate of the Federal courts is to be carried out. The record of the IRS in achieving compliance is dismal. Its initial response was to promulgate Revenue Procedure 75-50, which permits exemption if a school merely adopts a statement of nondiscrimination in its corporate documents and annually publishes a notice of nondiscrimination.

The paper compliance approach, which remains in effect today, permitted wholesale violations of the law. Paradoxically, many schools which have lost State support because they were adjudicated discriminatory to this day retain Federal tax exemptions.

This administration seemed to promise that for the first time the law would be adequately enforced. President Carter during his campaign embraced the principle that exemptions for segregated academies should not continue. Recognizing its long-neglected duties under the law, on August 21, 1978, the IRS published a proposed revenue procedure under which two categories of private schools would be required affirmatively and objectively to show that they are not discriminatory:

One, those schools adjudicated discriminatory in court or agency proceedings.

Two, those schools which have insignificant minority enrollment and which had been expanded or created in the wake of public school desegregation.

This proposed procedure placed the burden of proof where it belonged—on the schools seeking tax exemption. It also introduced certainty into the law by requiring the schools to show that within a reasonable period of time they had met four out of five objectively measurable factors:

Availability and grant of financial assistance to minority children; active minority recruitment programs; increasing minority enrollment; employment of minority professionals; and other substantial evidence of good faith.

While not perfect, this approach was in accord with Federal court decisions holding that insignificant minority enrollment and creation or expansion of private schools in the wake of public school desegregation raises an inference of racial discrimination. As the three-judge court said in *Green* v. *Connally*, these schools wear a "badge of doubt."

The August proposed revenue procedure was substantially redrafted after public hearings brought forth criticism—much of it misdirected—from the old foes of racial justice. In order to accommodate the few legitimate concerns that were raised by some commentators, the IRS has, in the new proposal, adopted a wholly different approach which, we believe, holds little promise for effective enforcement. While retaining the categories of "adjudicated" and "reviewable" schools, the IRS has, in effect, abandoned any attempt to make the process objective, predictable and, therefore, effective.

Under the new proposed procedure, not only is the issue of who bears the burden of proof unclear, but each of the presumptive facts which would shift the burden of proof to the school has become a discretionary matter for the Service to determine under "all the circumstances."

While we are not in agreement with the approach reflected in the new procedure and would favor a return to the August prototype, we do believe that the new proposal can be strengthened so as to facilitate its enforcement. Our comments are mainly designed to clarify that schools seeking exemption or continued exemption must assume the burden of proving nondiscrimination if they are adjudicated or reviewable schools.

Senator BYRD. Thank you, Mr. Kohn.

STATEMENT OF ERIC SCHNAPPER, STAFF COUNSEL, LEGAL DEFENSE FUND, NAACP

Mr. SCHNAPPER. My name is Eric Schnapper, NAACP Legal Defense Fund.

I would like to suggest that I think much of the criticism of IRS we have heard today is unwarranted. There has been a lot of discussion, philosophical in nature, about big government, the extent of regulation and the independence of the church and private schools.

The Internal Revenue Service has a statutory responsibility which you gave it, and that statutory responsibility is not to grant tax exemption to schools which discriminate on the basis of race. That is their job. If you want to avoid the present problems, you know perfectly well how to repeal the law. No one is proposing doing that.

If that is their responsibility, then they have got to make some kind of factual inquiry as to what is going on. They cannot grant a tax exemption based on a letter from the school saying, "We comply with the law." They do not do that in any other area. No one would really expect them to do that here.

What has been happening for the last few years has been the granting of tax exemptions based on a few paper representations, without any serious, factual inquiry, the kind of inquiry that would exist if your tax returns, or mine, were being audited.

The IRS has been giving out tax exemptions on that basis. That has clearly got to stop. It is totally different from the way anybody else is being treated in the country, and it is wrong to have a situation in which schools that the courts of this country have held to be segregated are, nonetheless, being given tax exemptions.

The issue before the committee and before the IRS is how that policy is going to be changed.

I think you are ill advised to think that the absence of objective standards is somehow or other going to be a boon to the schools. Suppose Mr. Kurtz simply told his people, "We have to have a factual inquiry. You have to find out if these schools are segregated. Even Chairman Byrd tells us they should not be. So go out and do what is right."

Is that the system you want? That is not going to give you uniformity. That is not going to protect you from the whims of bureaucrats. That is going to create a situation where there is going to be a danger, even based on the particular church with which a school is affiliated, that some pointy-headed bureaucrat is going to deny the exemption.

Clear, objective standards are essential for the protection of the schools. It is the only alternative to having total agency discretion. It is the border between what is commonly called the rule of law and the rule of persons.

I do not think that is what you want, but that is what you are heading towards if you try to stop this. There has not been a suggestion for different standards, or that IRS should not enforce the law, which would clearly be improper, or they should just do what is right, which I think is going to be against everybody's interests here. The latter would delay what ultimately will have to happen, and will make for more arbitrariness.

We have a number of problems about the new proposal, and to some extent, the older proposal as drafted. We have set them out in our written comments, which I will not fully summarize. To give you some sense of the problems, I would like to point to one particular provision which is in both the old and the new proposed regulations.

Both provide if a Federal court or the Supreme Court unanimously holds that a particular school is, in fact, discriminating on the basis of race, the IRS will nonetheless grant them a tax exemption if the 20-percent rule is met. That makes no sense. To give such an absolutely safe harbor defeats the purpose of the legislation.

I would like to say, finally, with regard to a proposal suggested by Senator Helms, that whatever the procedures are going to be, we should not make special rules to protect segregated private schools. For example, the burden of coming forth with evidence to justify tax treatments is usually on the taxpayer generally; we cannot have a special rule for schools that want to exclude black students. If we can do that, we can have a special rule for schools that want to exclude Catholics or Jews or anything else. We ought not get into that.

Similarly the rule is now that the burden of going into court lies with the taxpayer. If we want to change that, let's change that for the whole country. Let's not make special rules for schools that want to exclude blacks different from what the rest of the country has to do.

Thank you.

Senator BYRD. Thank you, sir.

STATEMENT OF ROBERT S. McINTYRE, PUBLIC CITIZEN'S TAX REFORM RESEARCH GROUP

Mr. McINTYRE. Mr. Chairman, my name is Robert McIntyre; I am director of the Tax Reform Research Group. I am here today to express my organization's strong support for the recent, belated steps that the Internal Revenue Service has taken to start the process of denying Federal tax exemption to private schools which discriminate on the basis of race.

Mr. Chairman, we have been here before. You know we disagree with you concerning some of the special subsidies in the tax code, with some of the ones you support.

But, while there may be legitimate questions as to whether some tax benefits are justified, in the case of subsidizing racism, there can be no dispute; it is simply wrong.

The issue here, Mr. Chairman, is not whether some misguided parents can decide to send their children to segregated schools. They can; they can support those schools. The question is whether the Federal Government should be endorsing and subsidizing those schools.

Mr. Chairman, as you know, the rules that the IRS has set out apply only to schools that are set up or substantially expanded in the wake of a desegregation order. Furthermore they are only applicable to schools where the representation of minorities is less than token.

Prior to 1954, segregated academies were called public schools in many parts of this country. *Brown* v. *Board of Education* ruled that that was unconstitutional. Even as that case was being argued, the Supreme Court was told that there were "more difficult and subtle ways" to maintain segregated schools. If you look at some of the school districts involved in *Brown*, and what happened in the wake of *Brown*, it is clear that those "more difficult and subtle ways" meant private, segregated, white academies.

For example, in Prince Edward County, Va., public schools were closed from 1959 to 1964. As late as 1969, almost all the white children were in private schools. There were two dozen white children and 1,800 black children in the public schools.

In Clarendon County, S.C., as late as 1974 the public schools had 1 white and 3,000 blacks. The rest of the white students were in private, white academies.

Mr. Chairman, the question on how to deal with these clear attempts to evade the mandate of *Brown* v. *Board of Education* through the use of Federal tax subsidies has to be answered by looking at what the schools do, not just what their policy statements are.

The Internal Revenue Service has finally come around to agree with this. We all have to agree with this.

It is very easy for a school to say "we will not discriminate." In fact, the IRS has found 20 schools that had been federally adjudicated to be discriminatory but are still maintaining their tax exemptions.

You know, Mr. Chairman, that normally the Internal Revenue Service does not give out tax benefits absent a showing of entitlement by the recipient. This is true whether you want to talk about tax benefits as subsidies or talk about them as people keeping their own money.

A.T. & T. does not get its billion dollars in investment tax credits without offering some evidence that it is entitled to them, that it bought the right machines. General Electric does not get $50 million in DISC benefits without showing that it set up the right paper corporation, that the "producer loans" were carefully constructed to comply with the tax code's provisions, and so forth.

Similarly, schools that want a tax exemption as an educational organization should be required to show that they are acting at least minimally in compliance with the public policy of this country that makes it wise for us to give them a tax exemption. That means they are not discriminating on the basis of race.

The new IRS rules are extraordinarily lenient in allowing schools to qualify for the safe harbor rule. We are worried about that. The rules will allow a school, for example, to double its enrollment in 4 years and still not be covered by the guidelines at all, even if there is no minority enrollment. We are worried about that.

Commissioner Kurtz says, if these guidelines do not work, if we still find the schools are discriminating, we will take another look. I think the subcommittee and the entire Congress should make sure the IRS stays on top of this. And all of us should maintain careful oversight of IRS's performance to be sure that we have eliminated the fact of government subsidies to racially discriminating schools.

Thank you.

Senator Byrd. Thank you, gentlemen.

I might say to Mr. Larson of the American Civil Liberties Union, while in some cases I think that ACLU goes to what I would consider an extreme, I do have a very high regard for the fact that your organization is willing to defend unpopular cases wherever those unpopular cases may exist.

Mr. LARSON. This obviously has turned into one such unpopular case.

Senator BYRD. I do not know about the popularity or unpopularity in this particular field. I was just speaking generally, that I want to express regard for the ACLU activity in various unpopular fields in which it has involved itself through the years. I have watched it through the years and I want to commend you and the organization for many of the unpopular causes that you have espoused.

Some of those I happen to agree with you on; others, I may not agree. But in any case, I think it has been a good service. Thank you for being here.

Mr. LARSON. Thank you, Mr. Chairman.

[The prepared statements of the preceding panel follow:]

STATEMENT OF E. RICHARD LARSON ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

I am E. Richard Larson, a National Staff Counsel for the American Civil Liberties Union. I appreciate the opportunity to present the ACLU's position on S.103 and S.449 as they pertain to the Internal Revenue Service's Proposed Revenue Procedure on Private Tax-Exempt Schools.

In the past eight months, the ACLU has generally supported the IRS's Proposed Revenue Procedure not only as constitutionally appropriate but also as constitutionally required. At the same time, we have cricized the Proposed Revenue Procedure as insufficient to satisfy the constitutional dictates to which the IRS is subject.

The most relevant constitutional principle in this context is the quite simple one that government may not involve itself in racial discrimination:

"[S]omething is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this court has condemned [government] involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. . . . [No government] shall in any significant way lend its authority to the sordid business of racial discrimination." *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 190–191 (1970) (Brennan, J., concurring).

Because we believe that IRS's Proposed Revenue Procedure at long last may bring its practices into compliance with this principle, the ACLU supports the Proposed Revenue Procedure. Because we believe that S.103 and S.449 would obstruct IRS compliance with the constitution and may themselves be unconstitutional, we oppose S.103 and S.449.

In this Statement, I shall address (1) the recent background of the IRS's Proposed Revenue Procedure; (2) the phenomenon of racially discriminatory schools; (3) the basic constitutional principles applicable to the IRS; (4) the constitutional principles for determining racial discrimination; and (5) the constitutional principles applicable to the establishment of religion. Based upon our analysis, we believe that the IRS's Proposed Revenue Procedure is constitutionally necessary, and that S.103 and S.449 must be opposed.

1. RECENT BACKGROUND OF THE IRS PROPOSED REVENUE PROCEDURE

The IRS's Proposed Revenue Procedure does not represent a new or sudden change in the IRS's mandate for denying taxexempt status to discriminatory private schools. Rather, the IRS's Proposed Revenue Procedure does reflect an effort by the IRS to deal with the growing problem of discriminatory private schools supported by the IRS and to do so in a manner to ensure that like cases will be treated alike. The IRS's Proposed Revenue Procedure also reflects a greater understanding of the constitutional principles applicable to the IRS, and a realization that the IRS has been violating those constitutional principles, e.g., *Green* v. *Kennedy,* 309 F.Supp. 1127 (D.D.C. 1970), and *Green* v. *Connally,* 330 F.Supp. 1150 (D.D.C.), sum. aff'd, 404 U.S. 997 (1971).

Last August, in a long overdue effort to comply with the constitutional principles applicable to it, the IRS issued its Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37296 (August 22, 1978). The ACLU submitted written comments to the IRS generally in support of the proposed procedure.

In December 1978, primarily in response to an outcry from the white private school movement, the IRS held four days of public hearings on its Proposed Revenue Procedure. At those hearings, the ACLU submitted oral and written testimony, again generally in support of the Proposed Revenue Procedure.

In February 1979, the IRS issued its revised, watered-down Proposed Revenue Procedure on Private Tax-Exempt Schools, 44 Fed. Reg. 9451 (February 13, 1979). Shortly thereafter, again primarily in response to the white private school movement, the Subcommittee on Oversight of the House Committee on Ways and Means held hearings on the revised Proposed Revenue Procedure. The ACLU submitted oral and written testimony, again generally in support of the Proposed Revenue Procedure.

The focus of this hearing once again is the Proposed Revenue Procedure. Also in the spotlight are S.103 and S.449.

S.103 is straightforward. It would prohibit the IRS from issuing in proposed or final form until December 31, 1980, any revenue procedure which sets forth guidelines to be used in determining whether educational institutions are operating on a racially discriminatory basis. S.103, if enacted, would freeze for the next two years governmental support of racially discriminatory private schools. If enacted, S.103 would be unconstitutional.

S.449 also is straightforward. It simply states that tax exemptions available to nonprofit organizations and tax deductions available for contributions to such organizations shall not be construed as a provision of federal assistance. This "Brave New World" bill is analogous to redefining apples as oranges. S.449 takes an obvious fact—that exemptions and deductions are federal assistance—and tries to tell us that such is not so. If enacted, S.449 either would be disregarded or would be unconstitutional.

2. RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

There is little doubt that many of our private schools are racially discriminatory. In fact, as recently as several years ago, it was still considered fashionable for some private schools to admit openly and blatantly that they were discriminatory. For example, the private school defendants in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), not only admitted they discriminated, but argued they had a legal right to do so. They were supported in this contention by a defendant-intervenor, the Southern Independent School Association. "That organization is a non-profit association composed of six state private school associations, and represents 395 private schools. It is stipulated that many of those schools deny admission to Negroes." 427 U.S. at 164.

The creation and expansion of many of our discriminatory private schools has been a direct outgrowth of public school desegregation. These instant schools—segregated white havens from desegregated public schools—became widely known as segregation academies.

During the Massive Resistance campaign against school desegregation, a basic opposition tool was the creation and public funding of private schools for white students only. See McLeod, "A Program for Private Schools" 21 Ala. Lawyer 73 (1959). When public school desegregation actually began to occur, this theory was put into practice.

The white private school movement in Prince Edward County and in Surry County, Virginia, is described in *Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F.2d 486, 489–491 (4th Cir. 1964). In summary, when Prince Edward County was ordered by a federal court to desegregate its public schools, the county officials met and: "appropriated $189,000 to reopen and maintain the public schools expected to accommodate approximately 1600 Negro children. At the same meeting, the Supervisors allotted $375,000 for 1964–65 tuition grants for an approximately equal number of white students expected to attend 'private' schools." 339 F.2d at 489.

In Surry County, the county officials created the Surry County Educational Foundation for white pupils. When "seven Negro plaintiffs" were ordered admitted to a white public school: "All of the white students applied for admission to the Foundation school, and all were accepted. Several Negroes likewise sought admission to the Foundation school, but their applications were all rejected. All white public school teachers resigned, and all were immediately hired by the Foundation." 339 F.2d at 491.

A similar sequence of events occurred in Macon County, Alabama, immediately following a federal court order requiring public school desegregation:

"By September 12 every white pupil had withdrawn from the [desegregated public] school. Of the original 250 [white students] registered to attend Tuskegee High School, approximately [140–150 transferred to other all-white public schools]

The remainder of the students went to a 'private' institution that has been set up in Tuskegee and named Macon Academy; this school has been limited to white pupils. Governor Wallace announced publicly that the State Legislature had provided for grants-in-aid to private schools and assured the organizers of the Macon Academy that the Macon County Board of Education would cooperate in making grants-in-aid available through the use of its statutory authority to provide such aid to students in lieu of operating a particular public school." *Lee* v. *Macon County Board of Education*, 231 F.Supp. 743, 747 (M.D. Ala. 1964) (3-judge court).

These are not isolated examples. Similar events are described in *Coffey and United States* v. *State Educational Finance Commission*, 296 F.Supp. 1389 (S.D. Miss. 1969); *Brown* v. *South Carolina State Board of Education*, 296 F.Supp. 199 (D.S.C.), aff'd per curiam, 393 U.S. 222 (1968); *Poindexter and United States* v. *Louisiana Financial Assistance Commission*, 275 F.Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968); *Hall* v. *St. Helena Parish School Board*, 197 F.Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962).

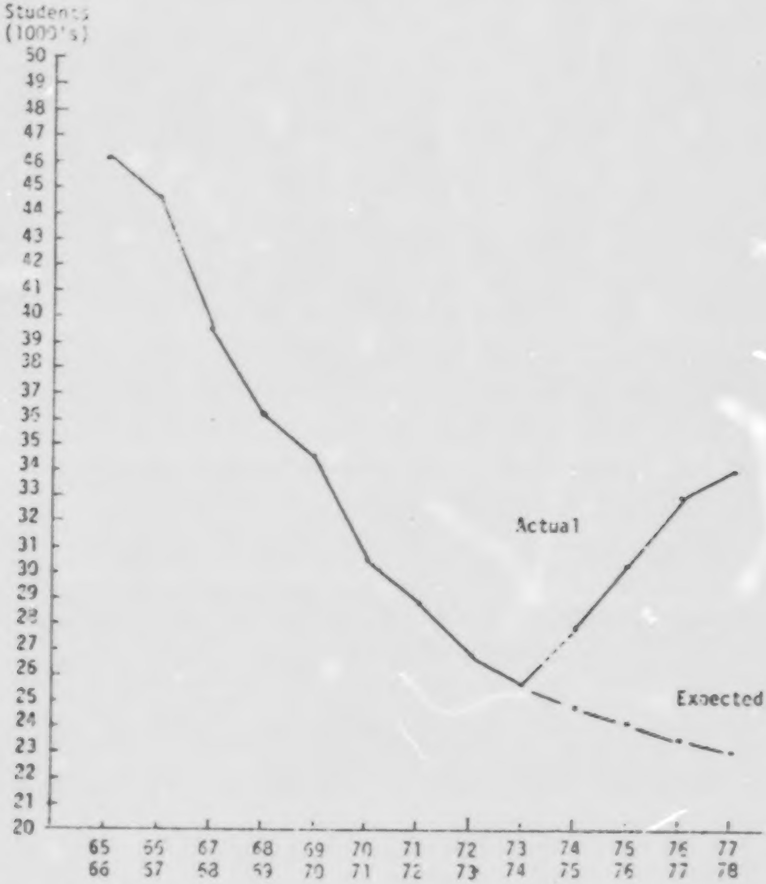
As these cases indicate, it has become an undeniable fact that nearly every community which has experienced public school desegregation also has experienced the creation and expansion of white private schools. This is not a past phenomenon. It is an ongoing and current reality.

Among the communities which have recently experienced the rapid creation and expansion of lily white private schools in response to public school desegregation is Louisville, situated in Jefferson County, Kentucky. Several years ago, the Jefferson County Board of Education found itself defending a metropolitan school desegregation lawsuit. As a result of that lawsuit, *Newberg Area Council, Inc.* v. *Board of Education of Jefferson County*, 489 F.2d 952 (6th Cir. 1973), vacated, 418 U.S. 918 (1974), decision reinstated, 510 F.2d 1359 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975), a public school desegregation plan was proposed in 1974 and implemented at the outset of the 1974-1975 school year. Part of the white community responded to those developments with white flight from the public school system to concurrently established and expanded private schools.

The tremendous growth of private schools in and around Jefferson County since 1974 has been documented in a 163-page report by the Jefferson County Education Consortium, "The Impact of Court Ordered Desegregation on Student Enrollment and Residential Patterns in the Jefferson County Public School District" (May 31, 1978). According to the report, private schools had experienced a consistently declining enrollment for the ten years prior to the desegregation "threat" of 1974; thereafter, however, that trend was "sharply reversed." Id. at 64. [A visual representation of this reversal is reflected in the accompanying chart.] The report continues: "Membership in non-public schools increased by 2,197 students in the school year 1974-75 following the desegregation 'scare'; gains of approximately 2,500 students were registered in 1975-76, the first year of the desegregation plan, and again in 1976-77. The rate of increase slowed slightly in 1977-78 with a membership gain of 1,047." Id. at 64-65.

Overall, private school enrollment increased by more than 8,200 students in four years. Id. Compared to the projected decline of private school enrollment which would have continued had there been no white flight from public school desegregation, private school enrollment over the four years actually increased by 10,891 students. Id. at 66. This increased enrollment had obvious effects. "Private schools which were on the verge of closing in the early 1970's are now turning applicants away." Id. at 65. Moreover, subsequent to "the actual implementation of the desegregation plan in 1975, there has occurred a 45 percent increase in the number of private, non-Catholic schools in the metropolitan area." Id.

Jefferson County Private School Enrollment



Id. at 63.

Jefferson County is hardly the only community which has experienced the creation and expansion of white private schools as a response to public school desegregation. According to the United States Commission on Civil Rights, of the nearly 20,000 private elementary and secondary schools in the country, approximately 3,500 of such schools were created or substantially expanded concurrently with public school desegregation and have little or no minority student enrollment. U.S. Commission on Civil Rights, Civil Rights Update (Jan. 1979).

Most if not all of these white private schools hold tax-exempt status given to them by IRS. In fact, it may be presumed that most of the schools were able to be created or expanded only because of the substantial economic benefit of the tax-exempt status awarded to them by the IRS.

3. BASIC CONSTITUTIONAL PRINCIPLES APPLICABLE TO THE IRS

Basic constitutional principles applicable to the IRS require the IRS not to provide tax-exempt status to discriminatory private schools. There are two interrelated facets to these principles.

First, it is beyond doubt as a matter of fact and as a matter of constitutional law that tax-exempt status confers a substantial economic benefit. As Chief Justice Warren Burger stated for the Supreme Court: "Granting tax exemptions . . . necessarily operates to afford an indirect economic benefit." *Walz* v. *Tax Commissioners*, 397 U.S. 664, 674 (1970).

Second, it also is beyond doubt as a matter of constitutional law that government may not, directly or indirectly, provide any economic benefit which facilitates racial discrimination. *Bolling* v. *Sharpe*, 347 U.S. 947 (1954). As Chief Justice Burger wrote for a unanimous court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), a government agency may not grant any economic aid where "that aid has a significant tendency to facilitate, reinforce, and support private discrimination." 413 U.S. at 466. This is because each agency's "constitutional obligation requires it to steer clear of giving significant aid to institutions that practice racial or other invidious discrimination." 413 U.S. at 466. See also, *Gilmore* v. *Montgomery*, 417 U.S. 556 (1974). This is not a novel principle. In *Cooper* v. *Aaron*, 358 U.S. 1 (1958), the Supreme Court unanimously declared that government "support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Constitution's] command that no State shall deny to any person within its jurisdiction the equal protection of the laws." 358 U.S. at 19. Applying this principle, the courts have held, for example, that recognition by the National Labor Relations Board of a racially discriminatory union is unconstitutional for the simple reason that when a "government agency recognizes such a union to be the bargaining representative, it significantly becomes a willing participant in the union's discriminatory practices." *N.L.R.B.* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973).

In fact, the courts have held that the federal government must be extremely careful about granting any kind of federal support to any discriminatory institution because "the Fifth Amendment impose[s] upon Federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State or local agencies funded by them." *NAACP, Western Region* v. *Brennan*, 360 F.Supp. 1006 (D.D.C. 1973).

These principles, of course, were brought to bear upon the IRS in *Green* v. *Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), and *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C.), sum. aff'd, 404 U.S. 997 (1971). The principles also have been applied by courts which have held that tax-exempt status granted by the government to discriminatory private clubs is unconstitutional. E.g., *McGlotten* v. *Connally*, 338 F.Supp. 448 (D.D.C. 1972) (three-judge court); *Pitts* v. *Department of Revenue*, 333 F.Supp. 662 (E.D. Wis. 1971).

Pursuant to the foregoing principles, the IRS has an unquestionable affirmative constitutional obligation to deny tax-exempt status to discriminatory private schools. For years, however, the IRS has failed to meet this affirmative constitutional obligation. Finally, as indicated in its Proposed Revenue Procedure, the IRS proposes to begin complying with its constitutional duty.

4. THE CONSTITUTIONAL PRINCIPLES APPLICABLE TO DETERMINING RACIAL DISCRIMINATION

In formulating its Proposed Revenue Procedure, the IRS was not without considerable guidance as to the criteria applicable to determining racial discrimination. Assuming that the IRS must apply constitutional standards rather than statutory standards,[1] the IRS must look to the racial statistics and the historical chronology of the private schools to which it grants tax-exempt status.

The use of racial statistics to determine unconstitutional discrimination is not a recent occurrence. Nearly 100 years ago, in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), the Supreme Court relied almost exclusively upon statistics to find unconstitutional discrimination. This use of racial statistics was recently explained by the Supreme Court in an employment discrimination context:

"Statistics showing racial or ethnic imbalance are probative [of discrimination] because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977).

Moreover, statistics which reveal a relatively severe racial imbalance usually establish "a clear pattern [of discrimination] unexplainable on grounds other than race." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). And statistics of racial imbalance are even more probative when combined with subjective or discriminatory selection criteria, such as those used to admit students to private schools. As Justice Blackmun wrote for the court in *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977), "a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." 430 U.S. at 494.

In addition to the necessary use of statistics to infer discrimination, there is another form of evidence which is highly relevant to finding unconstitutional discrimination. This is the "historical background," or the "specific sequence of events." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 427 U.S. 252, 267 (1977). These criteria quite obviously allow inferences as to why certain events, such as the creation or expansion of white private schools, actually occurred. Applying this principle, for example, the court in *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C.), sum. aff'd, 404 U.S. 997 (1971), ruled that private schools which were founded "at times reasonably proximate to public school desegregation" carried a "badge of doubt" concerning their eligibility for tax-exempt status. 330 F.Supp. at 1173.

The use of racial statistics and a focus on the timing of the creation or expansion of private schools have been used by the federal courts as the best criteria for determining whether private schools may be presumed to be racially discriminatory and hence ineligible for government aid. This in fact is precisely the procedure prescribed by the court in *Norwood* v. *Harrison*, 382 F.Supp. 921 (N.D. Miss. 1974), on remand from 413 U.S. 455 (1973); see also, *Brumfield* v. *Dodd*, 425 F.Supp. 528 (E.D. La. 1976).

The IRS, under its affirmative constitutional duty to extend *no* economic benefit to discriminatory private schools, can do no less. Although the IRS's Proposed Revenue Procedure adopts criteria more lenient toward discriminatory private schools than the federal courts have prescribed, there can be little doubt that the IRS has proceeded in the direction that it must proceed. At a minimum, the statistical and timing criteria proposed by the ORS represent a necessary step in the right direction.

5. ESTABLISHMENT OF RELIGION

Some of the opposition to the IRS's Proposed Revenue Procedure has arisen from white private schools that also are religious schools. These schools have argued that the IRS's Proposed Revenue Procedure represents a potential conflict with the First Amendment's guarantee of the "free exercise" of religion. The ACLU, a staunch defender of First Amendment freedoms, disagrees.

The first clause of the First Amendment to the Constitution of the United States unequivocally states: "Congress shall make no law respecting an establishment of religion." The ACLU believes this prohibition to be as absolute as it is stated to be. Accordingly, the ACLU has consistently opposed tax-exempt status for religious activities. Our policy on Religious Bodies' Tax Exemption states: "The ACLU 'believes that government subsidy of religious activities is a clear and flagrant breach of the establishment clause of the First Amendment, that tax exemption is the equivalent of subsidy, and therefore that tax exemption is constitutionally forbidden in spite of widespread and long-standing practice.' " ACLU Policy number 85.

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[1] The constitutional principles reviewed herein assume that the IRS, in order to determine that a private school is discriminatory, must find it to be intentionally discriminatory. But it is far from certain that this high standard of intentional discrimination is necessary. In fact, it probably is not necessary. Rather, a private school may be deemed discriminatory simply by violating the standards of 42 U.S.C. § 1981. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). And 42 U.S.C. § 1981 can be violated by practices which have a discriminatory effect, regardless of discriminatory intent. E.g., *Davis* v. *Los Angeles*, 556 F.2d 1334 (9th Cir. 1977), vacated as moot, 47 U.S.L.W. 4317 (U.S. March 27, 1979).

Our position on the establishment clause has been rejected by the Supreme Court. In *Walz* v. *Tax Commissioners*, 397 U.S. 664 (1970), the Court upheld the constitutionality of tax-exempt status for religious organizations. Because we believe that *Walz* was wrongly decided, we have not altered our policy opposing tax-exempt status for religious activities.

Regardless of ACLU policy, *Walz* is instructive on the parameters of tax-exempt status for religious bodies. Crucial to the decision in *Walz* was the fact, in the Court's view, that the government, in granting tax-exempt status, had "not singled out one particular church or religious group or even churches as such," but instead had authorized exempt status for a broad class of nonprofit community and civic groups. 397 U.S. at 673. Had the tax-exempt status been authorized only for specific religious groups or for religious groups in general, the authorization would have been an unconstitutional advancement of religion.

Not involved in *Walz* was any issue pertaining to racial discrimination by religious schools. Significantly, that issue was faced, albeit indirectly, by the Supreme Court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). Among the arguments presented there by the defendants was the argument that the governmental aid provided to the discriminatory private sectarian and nonsectarian schools was too insignificant to invoke constitutional scrutiny. Rejecting this argument, the Supreme Court held:

"The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. 'State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.' *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). Thus Mr. Justice White, the author of the Court's opinion in *Allen*, supra, and a dissenter in *Lemon* v. *Kurtzman*, supra, noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional. *Lemon*, supra, at 671 n.2." 413 U.S. at 464.

In formulating its Proposed Revenue Procedure, the IRS carefully avoided implicating the religion clauses of the First Amendment. The Proposed Revenue Procedure creates no distinctions or special conditions for religious schools. Although the Internal Revenue Service, during the formulation of the proposed revenue procedure, was rumored to have considered favorable distinctions and special conditions for religious schools the IRS rejected such an approach. Any such favorable distinctions or special conditions unequivocally would violate the First Amendment's establishment clause.

CONCLUSION

As this Statement has indicated, the IRS's Proposed Revenue Procedure is largely dictated by the constitutional mandates applicable to the IRS. Any failure or refusal of the IRS to adopt actual practices similar to those outlined in the Proposed Revenue Procedure would place the IRS in violation of the Constitution. In a similar manner, any congressional commands obstructing the IRS from performing its constitutional duties would make those very commands unconstitutional.

For the reasons stated herein, the ACLU supports the IRS's Proposed Revenue Procedure and opposes S.103 and S.449. We urge this Subcommittee not to report those bills but instead to commend the IRS for moving at long last toward the fulfillment of its constitutional obligations.

STATEMENT OF RICHARD S. KOHN, STAFF ATTORNEY, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

My name is Richard S. Kohn. I am a staff attorney with the Lawyers' Committee for Civil Rights Under Law, which was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. I should like to thank you, Mr. Chairman and Members of this Subcommittee, for the opportunity to express our views concerning the February 2, 1979 revised proposed revenue procedure governing tax exemptions for private schools. In a nutshell, we believe that this latest proposed procedure is inadequate and does not satisfy the criteria established by the federal courts to end governmental support of private schools which discriminate on the basis of race in their enrollment policies.

For a decade, we have been engaged in litigation to require the IRS to implement the principles of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that segregation by race in the public schools is antithetical to the Fourteenth Amendment. The decision in *Brown* triggered all manner of evasive tactics, ranging from massive resistance to subtle forms of indirect governmental aid to private discrimination. The creation and expansion of private schools for the purpose of undermining efforts to desegregate the public schools was expressly addressed by the Supreme Court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), which struck down a program of state textbook aid to White Citizens Council schools. Speaking for the full court, Chief Justice Burger said: "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" 413 U.S. at 465.

In 1969, the Lawyers' Committee filed suit against the IRS because it was apparent that, through the practice of granting tax exemptions to private segregated schools, the federal government was in the extraordinary position of undermining efforts to desegregate the public schools. As the result of that litigation, it is now the law of the land that private schools which practice racial discrimination are not entitled to tax exempt status. *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971). The fact that a school is church-related is not a basis for exception. *Goldsboro Christian Schools* v. *United States*, 436 F. Supp. 1314 (E.D. N.C. 1977). These underlying principles are not in dispute.

What is at issue is the administrative mechanism by which the clear mandate of the federal courts is to be carried out. The record of the IRS in achieving compliance is dismal. Its initial response was to promulgate Rev. Proc. 75-50, which permits exemption if a school merely adopts a statement of nondiscrimination in its corporate documents and annually publishes a notice of nondiscrimination. The "paper compliance" approach, which remains in effect today, permitted wholesale violations of the law. Paradoxically, many schools which have lost state support because they were adjudicated discriminatory to this day retain federal tax exemptions.

This administration seemed to promise that for the first time the law would be adequately enforced. President Carter during his campaign embraced the principle that exemptions for "segregated academies" should not continue. Recognizing its long-neglected duties under the law, on August 21, 1978 the IRS published a proposed revenue procedure under which two categories of private schools would be required affirmatively and objectively to show that they are not discriminatory:

1. Those schools adjudicated discriminatory in court or agency proceedings.
2. Those schools which have insignificant minority enrollment and which had been expanded or created in the wake of public school desegregation.

This proposed procedure placed the burden of proof where it belonged—on the schools seeking tax exemption. It also introduced certainty into the law by requiring the schools to show that within a reasonable period of time they had met four out of five objectively measurable factors:

1. Availability and grant of financial assistance to minority children.
2. Active minority recruitment programs.
3. Increasing minority enrollment.
4. Employment of minority professionals.
5. Other substantial evidence of good faith.

While not perfect, this approach was in accord with federal court decisions holding that insignificant minority enrollment and creation or expansion of private schools in the wake of public school desegregation raises an inference of racial discrimination. As the three-judge court said in *Green* v. *Connally*, these schools wear a "badge of doubt".

The August proposed revenue procedure was substantially redrafted after public hearings brought forth criticism—much of it misdirected—from the old foes of racial justice. In order to accommodate the few legitimate concerns that were raised by some commentators, the IRS has, in the new proposal, adopted a wholly different approach which, we believe, holds little promise for effective enforcement. While retaining the categories of "adjudicated" and "reviewable" schools, the IRS has, in effect, abandoned any attempt to make the process objective, predictable and, therefore, effective.

Under the new proposed procedure, not only is the issue of who bears the burden of proof unclear, but each of the presumptive facts which would shift the burden of proof to the school has become a discretionary matter for the Service to determine under "all the circumstances".

While we are not in agreement with the approach reflected in the new procedure and would favor a return to the August prototype, we do believe that the new proposal can be strengthened so as to facilitate its enforcement. Our comments are mainly designed to clarify that schools seeking exemption or continued exemption must assume the burden of proving nondiscrimination if they are "adjudicated" or "reviewable schools". This is no more than is required by federal law, as most recently reaffirmed in *Prince Edward School Foundation* v. *Commissioner*, No. 78-1103 (D.D.C. April 18, 1979). Our suggestions, which were communicated to the IRS on April 20, constitute what we regard as the bare minimum if the procedure is to have any chance whatever of halting federal support of private schools operating on racist principles. The most critical changes are as follows:

1. First, and most importantly, Sec. 3.03, which sets forth the criteria by which a school is determined to be "reviewable", fails to specify which party bears the burden of proof. It is axiomatic that, under the Internal Revenue Code, one who desires a tax exemption must establish his entitlement to it: in no case must the IRS prove non-entitlement. There is no reason to depart from the established rule here. This was the approach mandated by the court in *Green* and *Prince Edward School Foundation* v. *Commissioner*, and was followed in the August proposed revenue procedure.

Unfortunately, the new proposal is extremely vague on this critical question, a deficiency which must be rectified before the proposed procedure is finalized.

2. The procedure as drafted calls for the denial of tax exempt status to schools "adjudicated to be discriminatory" by final decision of a court or agency. Until the case is finally resolved, the tax exemption is retained. There is no reason why schools adjudicated to be racially discriminatory should enjoy their tax exempt status during years of appeals if those schools also fit the description of "reviewable" schools. Thus, we have suggested as an addition to Sec. 3.03 that a school may be treated as "reviewable" notwithstanding that it has been adjudicated to be discriminatory and is appealing that determination.

3. In the August proposal, a school was considered to have "substantially expanded" if the size of the enrollment had increased by 10 percent over the previous year. The new proposed procedure raises this figure to 20 percent. Allowing schools with insignificant minority enrollment to be immunized if their total enrollment has increased no more than 20 percent will, in our judgment, enable a number of schools which should be subject to scrutiny to avoid it. We have urged the Service to adopt a figure of 15 percent. Moreover, regardless of the percentage used, the use of total enrollments may not give an accurate picture particularly where certain grades in the public schools are newly desegregated. Accordingly, increased enrollment in grades corresponding to those newly desegregated in the community's public schools should automatically be regarded as substantial increases.

In 1971, in *Green* v. *Connally*, the Service finally conceded that it was under a duty to extricate itself from involvement with discrimination caused by the proliferation of private "seg academies". In 1976, we felt compelled to return to court to seek further declaratory relief and enforcement of the injunction in the face of gross dereliction on the part of the IRS to carry out the letter and the spirit of *Green*. This litigation has been held in abeyance while the Service has re-examined its enforcement responsibilities. Unfortunately, the latest version of the proposed revenue procedure does not appear to satisfy the criteria established by the federal courts. We have made our objections known to the Service and are hopeful that our concerns will be heeded. Failing that, we will return to the courts to vindicate the constitutional and statutory rights involved. In doing so we believe we represent not only our clients but also the better judgment of the country on a matter of fundamental importance. It seems to us that proper oversight at this stage should focus on ensuring that the Service promulgate a strong procedure and enforce it vigorously. The proposal presently before this committee does not do so.

Statement of Eric Schnapper, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.

INTRODUCTION AND SUMMARY

Thank you Mr. Chairman and members of the subcommittee for inviting the NAACP Legal Defense and Educational Fund, Inc., to present its views on the Revised IRS proposed revenue procedure on private school tax exemptions. My name is Eric Schnapper, and I am an assistant counsel at the Fund.

For many years, lawyers associated with the Legal Defense Fund have represented black parents and school children in school desegregation actions throughout the southern states and in other areas as well. These cases include *Brown* v. *Board of Education*, decided in 1954, that established the basic rule that racial segregation in public education was an unconstitutional denial of equal protection of the laws, and *Green* v. *County School Board of New Kent County* decided in 1968 and *Alexander* v. *Holmes County Board of Education* in 1969 in which the "all deliberate speed" formula of *Brown* was revised, and school boards finally told to desegregate "immediately" and to devise desegregation plans that "promise realistically to work now." The Legal Defense Fund also has brought cases to stop illegal governmental aid to racially segregated private or parochial schools founded or significantly expanded during public school desegregation as havens for white students whose parents have abandoned the public school system. The most notable case in this area is *Norwood* v. *Harrison*, decided in 1973, in which a unanimous Supreme Court held that the Constitution requires that the State of Mississippi may not give state textbook assistance to so-called "white flight" or "segregation academies." The Fund also has participated in *Green* v. *Connally*, the case which requires the IRS to promulgate effective procedures to enforce the rule of *Norwood* v. *Harrison* that government not support such racially segregated private or parochial schools.

The Legal Defense Fund believes that these and other authorities require that the Internal Revenue Service has a duty to draft proposed revenue procedures which will in fact work to enforce the constitutional rule that government must not provide sanction and support for segregation academies. This is not accomplished by the revised proposed revenue procedure of February 9, 1979. Instead, the revised procedure is an unconstitutional dilution of the prior proposed revenue procedure of August 22, 1978. More specifically, the revised procedure is ineffective and administratively unworkable: the IRS simply will not be able to adequately discharge its constitutional duty. First, the revised procedure creates a different and lesser standard for determining that a white private school founded or significantly expanded during public school be deprived of its tax exemption. The standard is less than that which the federal courts use, and therefore unconstitutional. Second, the revised procedure significantly weakens the terms of the prior proposed procedure in order to open up unacceptable loopholes for discriminatory segregation academies.

The net result is that the revised procedure will perpetuate, not remedy, the continuing evil of federal government sanction for segregation academies. The Legal Defense Fund believes that this result will imperil public school desegregation by giving comfort to those who have abandoned public schools during the desegregation process, and put the federal government in the anomalous position of supporting public school desegregation through the federal courts, and supporting segregation academies through IRS tax exemptions.

PURPOSE OF THE REVISED REVENUE PROCEDURE

No one can legitimately dispute the duty of the Internal Revenue Service. Although *Brown* v. *Board of Education* was decided by the Supreme Court in 1954, no substantial public school desegregation occurred until the late 1960's with decisions in Legal Defense Fund cases that immediate desegregation measures were required which promise realistically to work now. Later decisions in *Swann* v. *Board of Education of Charlotte-Mecklenburg* (1971), and *Keyes* v. *School District No. 1, Denver, Colorado* (1973) (both Legal Defense Fund cases) drive home the point that the constitutional guarantee of equal protection of the laws requires effective public school desegregation.

As a concomitant of public school desegregation litigation, the Legal Defense Fund and other civil rights groups have found it necessary to enjoin efforts of local school boards and governmental entities to evade constitutional command by giving governmental aid and support to segregation academies set up in the wake of federal court school desegregation orders. Such aid has included outright gifts of public property and buildings, student tuition grants and textbooks. In these cases courts decided that such evasion could not stand: government cannot support such racial segregation under the guise of support for private schools. The key case is *Norwood* v. *Harrison* in which the Chief Justice declared that "[a] State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools but also of giving significant aid to institutions that practice racial or other invidious discrimination." The Court then remanded for certification procedures to determine if private schools were discriminatory. The Court has not stepped back from this vigorous prohibition against governmental support of racially segregated private education; indeed, the Supreme Court has gone further and found that underlying racial segregation in private education is itself contrary to the Civil Rights Act of 1866, holding in *Runyon* v. *McCrary* (1976) that federal law prohibits private schools from excluding qualified children solely because they are black.

It has long been clear that the federal government has the same duty as the states not to support racial segregation. The Internal Revenue Service, like other arms of the federal government, must support and defend the Constitution.

This principle, however, has been violated by the IRS in its present procedure for granting of tax exemption for discriminatory private schools. The Legal Defense

Fund and other civil rights organizations discovered early on that although federal courts found in Mississippi and Louisiana, notably, that segregation academies were racially segregated and that state aid to such schools was prohibited, the IRS still maintained the tax-exempt status of private schools which practiced racial discrimination. This led to the filing of *Green* v. *Connally* in 1970 in which federal district court in District of Columbia expressly ruled in granting a temporary injunction that, "[t]he Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formally supported." *Green* was summarily affirmed by the Supreme Court. A year later the district court ruled that the Internal Revenue Code does not permit tax-exempt status for racially segregated schools, and that the IRS was permanently enjoined from granting or continuing to recognize the tax exempt status of such schools and required to set up proper administrative procedures. It is pursuant to this injunction that the original proposed procedure and the revised proposed procedure were published.

COMMENTS ON THE REVISED PROPOSED REVENUE PROCEDURE

The Legal Defense Fund believes that the original proposed procedure published August 22, 1978 was generally acceptable and its approach to dealing with segregation academies in compliance with the constitutional duty of the IRS. The original procedure, however, had several weaknesses. The revised proposed procedure published February 9, 1979, abandons the correct approach of the earlier proposal and compounds the weaknesses of the original proposal. The revised procedure, therefore, is a retreat by the IRS from constitutional command.

THE ISSUE

The precise issue is the standards that govern whether tax exemptions will be granted to segregation academies. The issue is not the authority of the IRS: it is clear that the IRS has the power, and indeed the duty, to comply with the constitutional prohibition of governmental support for racial segregation and the statutory limitation that tax exemptions be awarded only legitimate charitable organizations. Governmental support for a segregation academy formed or expanded as a haven for court-ordered public school desegregation is contrary to all law and public policy. Nor is the issue presented the broad question of IRS tax exemptions for all private schools: the question is limited to those private schools which have a very specific genesis in discrimination, that is, schools which are demonstrably white flight schools.

Thus, neither the original nor revised proposed procedure deal with the broader question of the standards governing tax exemptions for all private schools. Instead, the proposed procedure is targeted at a clear evil: segregation academies which owe their existence to public school desegregation. Such private schools were formed for a clearly impermissible purpose, as the Supreme Court held in *Norwood* v. *Harrison*. Private schools formed for permissible purposes simply are not covered by the proposed procedure.

Both the original and revised procedure essentially deal with two kinds of segregation academies, schools adjudicated discriminatory and reviewable schools, which we comment on both as to the basic approach and weaknesses in the actual implementation.

SCHOOLS ADJUDICATED TO BE DISCRIMINATORY

A. *The basic approach*

There, of course, can be no serious quarrel with provisions of the original proposed procedure that a school adjudicated to be discriminatory by a federal or state court of competent jurisdiction or proper federal or state administrative agency will be considered racially discriminatory. This much is clear: the requirements of uniform federal civil rights enforcement require that the IRS no longer, as it did in Mississippi in the early 1970's until the *Green* injunction, hinder the efforts of federal courts trying to desegregate public schools by giving tax exemptions to discriminatory private schools. IRS tax exemptions in those years clearly aided evasion of federal court or HEW administrative action. The same is true for state court or administrative actions to which IRS should defer.

B. *Weaknesses in implementation*

However the original proposed procedure on schools adjudicated discriminatory, had several defects, most significantly that the actual enrollment of 20 percent of the percentage of the minority school age population in the community is sufficient alone to rebut a court or agency finding of a school adjudicated discriminatory. This works out in an area that is 10 percent black or minority to a 2-percent benchmark and in an area 20 percent minority to a 4-percent benchmark. The setting of such a low benchmark of nondiscrimination is, we believe, unwise. This so-called "safe harbor" figure is nothing but tokenism for it would permit a private school no matter how bad its policies and practices have been found by a court to maintain its tax exemption merely by admitting a token number of black or other minority students. There simply is no justification for the use of such a low figure for a private school adjudicated discriminatory; instead, such a threshold figure should be at least, for example, 80 percent of the minority student population in the district.

This weakness in the original proposed procedure has been perpetuated in the revised procedure. Permitting a school adjudicated discriminatory by another arm of the federal government to maintain a tax exemption merely by meeting this unconstitutionally low safe harbor percentage is just as wrong now as it was then. The IRS simply should not permit such evasion or condone disuniform civil rights enforcement.

Moreover, the revised procedure compounds the weaknesses of the original procedure on schools adjudicated discriminatory. Thus, the revised procedure limits court or agency findings of discrimination which trigger deprivation of a tax exemption to "final" court or agency decisions for which no further administrative or judicial appeal can be taken. The impact of this revision is to permit a school adjudicated discriminatory to maintain its tax exemption merely by appealing the decision through the agency or courts, which may take several years. The parallel in public school desegregation cases is stays of desegregation orders after a school has been found discriminatory, a practice which the courts generally have refused. The same reasoning applies here: such delays unconstitutionally defer an effective remedy and open up an unacceptable way for further evasion. Thus, a school adjudicated discriminatory would have two bites at the apple: appeal in the courts or agencies after the finding of discrimination and then a further appeal within IRS and then to federal courts on tax exemption. Throughout all this time, the school's tax exemption would be maintained and the adjudication of discrimination would be nothing but a dead letter.

REVIEWABLE SCHOOLS

A. The basic approach

It is with respect to the reviewable school category that the revision works the most mischief. The original proposed procedure properly recognized that tax exemptions should not be accorded schools adjudicated discriminatory, but also that private schools which meet the twin objective tests of (a) establishment or significant expansion during public school desegregation in the local public school district or districts, and (b) insignificant numbers of minority students. This approach of the original proposed procedure is in accord with the practice of the federal courts, and recognizes the reality that there are many more private schools with discriminatory policies and practices than private or governmental cases would indicate. The Legal Defense Fund thus generally supported this approach as an effective and administrative workable approach that properly relies on objective and verifiable criteria of whether a school has a genesis in discrimination instead of the present reliance of the IRS on mere avowals of nondiscriminatory policy.

The experience in Mississippi indicates that subjective and unverified professions of good faith and nondiscrimination are not enough in the situation where, as here, an all-white private school has been established or significantly expanded in the wake of a local public school desegregation order as an escape for those seeking to escape the desegregation order. The governing caselaw compels this test developed by Judge Keady in *Norwood* v. *Harrison*, 382 F. Supp. 921 (N.D. Miss. 1979) that such schools must be deemed to be prima facie discriminatory, see *Arlington Heights* v. *Metropolitan Housing Corp.* (1976) and to be a prima facie interference with school desegregation, see *Wright* v. *Council of City of Emporia* (1972). This evidentiary test, however, does not create a conclusive determination of discrimination; the school may present rebuttal evidence. As Judge Keady put it, "rebuttal evidence may not be limited to mere denials of a purpose to discriminate; rather to be effective, the evidence must clearly and convincingly reveal objective acts and declarations establishing that the absence of blacks was not proximately caused by such school's policies and practices." If the school carries its heavy burden, then there may be a further inquiry as to whether the school's policies and practices are only a pretext for discrimination. The use of prima facie case and burden of proof in determining whether discrimination exists in the original proposal is not remarkable: the Supreme Court recently affirmed its use in *International Brotherhood of Teamsters* v. *United States*, Part II (1977), an employment discrimination action.

While the original proposed procedure may have been unclear in permitting a private school to present rebuttal evidence, the approach of having an initial *prima facie* determination of discrimination arise from objective and verifiable criteria, as in the federal courts, was correct. Under the original procedure, the disuniformity that now characterizes federal civil rights enforcement was eliminated and the federal government spoke with a single voice.

However, the revised procedure tampers with the basic approach of the judicial prima facie case in the reviewable schools' category. Instead of merely clarifying that reviewable schools which are prima facie discriminatory may nevertheless be given the opportunity to present rebuttal evidence of nondiscrimination in exceptional circumstances as the courts require, the IRS has created an exception which will in fact swallow the rule by weakening what constitutes prima facie discrimination. Instead of relying on objective criteria of establishment or substantial expansion during local public school desegregation and no or few minority students, the revised procedure requires that a school will only be reviewed if in addition to meeting the basic objective criteria of genesis in discrimination, that the school be one "whose creation or substantial expansion was related in fact to public school desegregation in the community." The problem is that under court decisions a prima facie determination of discrimination must be imputed by objective evidence alone, that is, the school's formation or expansion during the process of public school desegregation and that no or very few minority students attend the school. That a segregation academy's formation or expansion was in fact related to public school desegregation is the very point or conclusion that arises from a prima facie case unless rebutted. To require that the conclusion be part of or an element in the prima facie showing itself essentially abandons the basic judicial prima facie approach. Instead, no school will be reviewable unless it is conclusively discriminatory. Thus the revised procedure states that: "Ordinarily, the formation or substantial expansion of a school at the time of public school desegregation in the community will be considered to be related in fact to public school desegregation. However, notwithstanding the general rule, the Service will consider evidence that a school's formation or substantial expansion was not related in fact to public school desegregation in the community and that the school therefore is not a reviewable school." The revised procedure, while ostensibly proclaiming that such a determination "must be based on objective evidence," then lists illustrative facts which indicate that a school is not related in fact to public school desegregation and illustrative facts which indicate that a school is related in fact to public school desegregation. We do not have objections to the illustrative facts themselves; what the Legal Defense Fund objects to is that these illustrative facts are part of the prima facie case which IRS has the burden to prove. The proper procedures would be that the illustrative facts constitute a set of guidelines for schools which believe that exceptional circumstances exist which constitute a rebuttal of prima facie discrimination which the school has the burden to prove once a prima facie case is made out. Putting this burden of proof on IRS is contrary to how discrimination is determined by the federal courts.

This is not a technical objection. It goes to the heart of whether the Internal Revenue Service will apply the same standards to segregation academies as the federal courts. Under the revised procedure, IRS must not only find an objective prima facie case in order to review a school, but must also find absence of facts illustrative of relation of the school's formation or expansion to public school desegregation and presence of facts illustrative of the relation. This procedure simply is unworkable since an extraordinary investigation of the particular practices of a school will be required even before it is reviewable. First, this approach is contrary to judicial decisions which have created the prima facie case approach precisely because the initial burden of proof in a discrimination case should be based on objective criteria alone, in order to expedite such determinations. The IRS has no authority to apply a less rigorous standard than the federal courts: its only constitutional power is either to implement the same standards or to implement more rigorous standards. Second, adopting less rigorous standards creates disuniform federal civil rights enforcement. Under judicial standards relief must be provided if a school is discriminatory under the objective criteria unless the school proves otherwise, while under the standards of the revised procedure, a segregation academy can sit back and wait until IRS shows that a school is discriminatory under objective criteria and further shows absence of rebuttal. The entire burden of enforcement is on IRS as it is now. Putting the entire enforcement burden on IRS means that there will be continued ineffective enforcement. Third, putting the entire enforcement burden on IRS is an anomaly under the Internal Revenue Code. In no other area must the Service prove that an entity seeking a tax exemption is not entitled to one: in all other areas, it is the proper burden of the seeker of the exemption to prove it deserves the exemption. The approach of the original proposed procedure with respect to reviewable schools was in accord with the structure of the Internal Revenue Code; the approach of the revised procedure is not. Fourth, not only is ineffective civil rights enforcement unconstitutional, the singling out of segregation academies for special and more lenient treatment in the area of tax exemptions is itself unconstitutional. Government cannot deliberately decide to give civil rights enforcement a lower priority than all other kinds of enforcement.

B. Weaknesses of implementation

The revised procedure as to reviewable schools is weakened not only as to basic approach, but as to specific features. Thus, the revised procedure's reliance on the 20 percent safe harbor approach is an unconstitutionally low here as in the case of schools adjudicated discriminatory. A showing of token black student enrollment has never been enough to relieve an institution from finding of prima facie discrimination. Instead, the 20-percent figure should be revised upward to a realistic level commensurate with community expectation. Nor should a showing of prima facie discrimination based on objective evidence be relieved by avowals of good faith measures to attract minority students without indicia of effective remedy in terms of specific numeric or percentage indicia of compliance as Section 4.03 permits. The failure of such programs to result in minority enrollment is not just "a factor in determining whether such activities are adequate or are undertaken in good faith," it is the critical factor. Similarly, unnecessary grace periods delay compliance.

The revised procedure has further weaknesses. Thus, the threshold figure for whether a school has significantly expanded during public school desegregation has been raised from 10% to 20% in section 3.03(a), permitting segregation academies a further unwarranted loophole. Another weakness is that the revised procedure now even permits deferrals of denials of exemption in Section 6.03 for schools not meeting the lax substantive standards of the revision. Furthermore, the lax standards of "reviewable schools" category will not even be effective until on and after January 1, 1980; the proper course would be to make these standards effective immediately.

CONCLUSION

In sum, the Internal Revenue Service is now significantly diluting its August 22, 1978 proposed procedure which while imperfect was nevertheless basically correct in its approach. The NAACP Legal Defense and Educational Fund believes that the unmanageability of the revised procedure is so great that the revised procedure fails to meet constitutional and statutory standards of validity and to thwart the basic purposes of the enterprise. IRS will continue in the business of rubber stamping tax exemptions for segregation academies. It makes good sense as well as good law for segregation academies formed or significantly expanded during public school desegregation which have no or very few black and other minority students to be deprived of the sanction of a federal tax exemption as a charitable organization except in exceptional circumstances, such as true coincidental formation of a school, or formation or expansion of a school which does not draw from the public school population. It does not make sense or good law to continue to permit such segregation academies to maintain their tax exemptions by substituting a patently unworkable enforcement scheme for the present complete lack of enforcement: the impact will be the same either way, viz., segregation academies will be havens for those students fleeing public school desegregation.

STATEMENT OF ROBERT S. MCINTYRE OF PUBLIC CITIZEN'S TAX REFORM RESEARCH GROUP

Mr. Chairman, members of the Subcommittee. I am Robert S. McIntyre, Director of Public Citizen's Tax Reform Research Group. I am here today to express my organization's strong support for the recent, belated steps taken by the Internal Revenue Service to deny federal tax exemptions to private schools which discriminate on the basis of race.

Over the years, Congress has chosen to encourage or reward many different kinds of behavior through special provisions in the tax code. A number of these tax subsidies are, in our opinion, inefficient and unjustified, but none of them is directly illegal or unconstitutional. To subsidize racism, on the other hand, would be both.

Official discrimination on the basis of race—originally and unfortunately authorized in the federal constitution—was finally outlawed in the thirteenth, fourteenth and fifteenth amendments. In 1954, *Brown* v. *Board of Education* held that the fourteenth amendment prohibits racial segregation in public schools. Title VI of the

Civil Rights Act of 1964 extended *Brown* to deny federal assistance to private schools that discriminate.

Given the reaction of some Southern school districts to the 1954 Supreme Court decision, such congressional action was clearly necessary. Just two months after *Brown*, the Prince Edward, Virginia Board of Supervisors issued a resolution stating that it was "unalterably opposed to the operation of nonsegregated public schools in the Commonwealth of Virginia," and that it intended to use "its power, authority and efforts to insure a continuation of a segregated school system." More than half of Virginia's counties passed similar resolutions within the next several months, and when the rules for implementing the *Brown* decision were argued before the Supreme Court the Virginia lawyers warned the Court of the "more difficult and subtle ways" which would be used to circumvent the Court's decision. That these "more difficult and subtle ways" meant the establishment of a white "private" school system was evident in the events which followed in Prince Edward County. From 1959 to 1964 the public school system was simply closed. By 1969 some 1,800 white children attended the private white academy, while only two dozen attended the public schools. Even after substantial progress, by 1974 there were only 358 white children sharing the public schools with 1,728 blacks.

In Clarendon County, South Carolina, whose lawyers had told the Supreme Court that *Brown* might "drive the people to seek other means to educate their children," the situation is even worse. As of 1974, only one out of three white children attended the public schools in Manning, and in Summerton the public schools held 3,000 blacks but only one white.[1]

Title VI clearly mandates that the segregation academies be denied federal subsidies, but the Internal Revenue Service was slow to recognize the "more difficult and subtle ways" in which the all-white schools were evading this statutory mandate. By obtaining 501(c)(3) tax exempt status, the schools were able to garner extensive federal support, primarily in the form of charitable contribution deductions for their patrons and the parents of their students. Anyone doubting the actual financial benefits of these "disguised tuition tax credits" to the schools should take note of the intense lobbying on the part of the schools to keep them.

In spite of the constitutional, statutory and moral mandate against federal aid to segregated schools, the Internal Revenue Service did not act to deny tax benefits to such institutions until a federal court, in a 1971 decision affirmed by the Supreme Court, ordered the Service to do so.

The initial IRS attempts to fulfill its responsibility—which to date have simply required the schools to publish statements to the effect that they do not discriminate—have not been successful. The IRS itself has identified some 20 schools actually adjudicated to be racially discriminatory which have nonetheless complied with its current weak requirements, and are enjoying the benefits of tax exemption. This abhorent situation is not only contrary to national policy, it is also unfair to other taxpayers, including already overburdened low and middle income individuals, who must pick up the tab for these exempt schools which operate contrary to that public policy.

Last fall when the IRS proposed changes in its guidelines for determining whether a school qualifies for exemption, we welcomed the changes as a more effective way to deal with the problem. We continue to support the IRS proposal in its revised form. The key is to establish an administrative procedure which effectively identifies schools that discriminate and denies the tax subsidy to those schools. The way to identify those schools, we believe, is not to merely examine a schools purported non-discriminatory policy, but to look at its actual performance in opening its doors to racial minorities.

We believe that to do this the IRS is correct in focusing on two types of schools: schools adjudicated to be racially discriminatory and schools which were founded or substantially expanded during public desegregation in the community and which have insignificant minority enrollment. Much of the criticism of the original IRS proposal centered on its treatment of the second class of schools; some of those opposing the guidelines maintained that they were inflexible, and did not take into consideration a school's intention and special problems in attracting minorities. The revised guidelines meet that criticism in several ways—by looking at whether a school's formation or expansion was actually linked with the public school desegregation, by making special allowances for schools operating within a system, and by removing the requirement that a school falling into question take a certain number of steps to show that it does not discriminate.

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[1] We do not mean to suggest, by the way, that the "massive resistance" to the *Brown* decision called for in the notorious "Southern Manifesto" of 1956 typifies attitudes in most southern school districts today. Currently, nearly half of southern black children are enrolled in majority white schools, and less than 10 percent are in all black schools—a record which compares favorably to that of many northern cities. But the fact that the situation has improved dramatically in the alst 25 years is no reason to tolerate continued federal subsidization of segregation where it is still maintained, in the South or in the North.

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In fact, we are concerned that by making the guidelines more flexible and lenient, the IRS may have substantially weakened their effectiveness. In particular, the redefinition of "substantial expansion" to allow up to 20 percent per year increases in enrollment over a period before and during implementation of public school desegregation plans without triggering heightened scrutiny—rather than the 10 percent rule of the original proposed ruling—may be too lax. It would allow a school to increase its enrollment by 44 percent in two years and by more than 100 percent in four years and still qualify for "safe harbor" exemption from the guidelines. Commissioner Kurtz has assured us, however, that the Service will watch carefully to assure that the guidelines work successfully. If it appears that white flight schools are tailoring their expansions to frustrate public school desegregation plans we would expect the Service to propose tougher rules.

It should be emphasized that heightened IRS review will not be triggered merely because a school has low minority enrollment. Only schools established or expanded to try to thwart a desegregation plan will have an extra burden to show their nondiscriminatory policies and operations.

We believe that it is the responsibility of the congressional tax committees, not only to encourage the IRS to move quickly in implementing the new guidelines, but also to provide conscientious oversight to insure that they are effective in carrying out the national policy against racial discrimination.

Senator Byrd. At this point, it will be necessary to recess. I hope it will be convenient for the other witnesses if we recess until 1:30 and at that point, we could proceed with the testimony.

The committee will stand in recess until 1:30.

[Whereupon, at 12 noon the subcommittee recessed, to reconvene at 1:30 p.m. this same day.]

Afternoon Session

Senator Byrd. The committee will come to order.

The next witnesses will compose a panel consisting of Robert L. Lamborn, executive director, Council for American Private Education; Dennis Rapps, legal counsel, National Society of Hebrew Day Schools; Dr. Charles Hirsch, executive director, Seventh-day Adventists; and George Reed, general counsel, U.S. Catholic Conference.

Welcome, gentlemen. The time will be 15 minutes, and I assume that you gentlemen will divide it as you think best.

STATEMENT OF ROBERT L. LAMBORN, EXECUTIVE DIRECTOR, COUNCIL FOR AMERICAN PRIVATE EDUCATION

Mr. Lamborn. We have attempted to do that, and we will proceed within those limits.

I am Robert Lamborn, executive director of the Council for American Private Education; for the council and those members who are not present, I express appreciation for the opportunity to testify and ask that the full testimony will be made a part of the record.

Senator Byrd. The full testimony will be made a part of the record.

Mr. Lamborn. The Council for American Council for Private Education, CAPE, is a coalition of 15 national organizations serving private schools, kindergarten through 12, which enroll approximately 90 percent of the children attending private schools. CAPE, its member organizations, and the schools they serve actively support a policy of racial nondiscrimination. We endorse the civil rights purpose of the proposed revenue procedure and believe that the tax-exempt status should be denied to private schools which in fact discriminate on the grounds of race.

Member organizations are listed in our written testimony. Other members of this panel represent other member organizations of the council.

We believe that, as a body, private schools should be judged by their positive record on civil rights matters, not by the performance of the relatively quite small proportion of the private schools which may in fact operate in a racially discriminatory way. We believe, also, that in drafting revenue procedures relating to tax-exempt private schools great care should be taken to focus on schools which are in fact discriminatory and to protect those which are, in fact, nondiscriminatory in their practices.

The proposed procedure of February 9, 1979, clearly reflects the serious efforts IRS has made to be responsible to those concerns. There remain, we believe, several matters of principle which should be addressed, as well as a number of points which should be clarified.

SECTIONS 2.01 AND 2.02

In reaffirming the application of racial nondiscrimination to religious schools, 2.01, the IRS should at the same time reaffirm that a religious school may select its students from membership in the religious denomination if the latter is nondiscriminatory. See Revenue Procedure 75-50, section 3.03. This preference or priority does not constitute racial discrimination.

The proposed revenue procedure does not affirmatively state this principle which is fundamental to the application of the racial nondiscrimination policy to religious schools. This will be our only comment on the fundamental church-state issues which are raised by the proposed procedure. Others will address the issues as they feel it appropriate.

SECTION 3.03(C)

We do not believe that ordinarily the foundation or substantial expansion of a private school at the time of a public school desegregation in the community should be assumed "to be related in fact to public school desegregation." This is a point of major disagreement with the proposal. We believe, to the contrary, that the relationship in fact should be based upon objective evidence, taking into account all the facts and circumstances related to the school's formation or expansion. There should be no presumptions of guilt.

SECTION 3.04

The presently proposed definition of "Community" while a marked improvement over the earlier definition, still disregards the factors other than geographic which describe the nature of a private school community. In the simplest instance, a private school community may be defined as the religious community which owns and operates a religious school and the families it serves. It will often bear little relation to neighboring public school districts. In another instance, a school's community may have coalesced around a highly complex set of interrelated socio-economic-philosophic factors. This school's community, too, will bear little or no relationship to the geographic boundaries of neighboring public school districts.

The procedure should be further adapted to the fundamental differences between the character of communities served by public schools and of those served by private schools.

Am I right in understanding that I have exceeded my time?

Senator **Byrd**. You are just on the red button.

Mr. **Lamborn**. The procedure specifies actions and programs which are considered to contribute to attracting minority students on a continuing basis. We believe it is essential and entirely reasonable that in the evaluation of a school's performance in these areas judgments be made on the basis of a realistic appraisal of the school's resources.

Advance assurance of deductibility of contributions is vitally important to the financial well-being of many schools. The withdrawal of the advanced assurance of deductibility before a school has the opportunity to defend itself on the question of racial discrimination places a school in unwarranted jeopardy. We think this should not occur. Thank you, sir.

STATEMENT OF DENNIS RAPPS, LEGAL COUNSEL, NATIONAL SOCIETY OF HEBREW DAY SCHOOLS

Mr. **Rapps**. My name is Dennis Rapps, executive director of the National Jewish Commission on Law and Public Affairs, generally known as COLPA.

COLPA is a voluntary association of attorneys and social scientists. I appear here today on behalf of COLPA and the National Society of Hebrew Day Schools.

The National Society of Hebrew Day Schools is the orthodox Jewish association which serves as a coordinating body for over 500 Jewish day schools in the United States and Canada. My comments are also joined in today by the major orthodox Jewish organizations in this country.

In our testimony before the Internal Revenue Service last December, we submitted certain comments and suggestions with respect to the original version of the proposed revenue procedure. We recognize that there is a version under consideration by this committee today which has taken into account many of our comments, but we believe the current version still fails to take into account one or two basic objections and, in certain situations, we believe it would conflict with rights guaranteed by the first amendment.

In Revenue Procedure 75-50 it was stated quite clearly that a religious school will never be deemed discriminatory merely because it restricts its student body to members of its own religious denomination as long as membership in that denomination is open to all on a nondiscriminatory basis.

The currently proposed revenue procedure departs from this principle and may, in some instances, force a religious school to choose between admitting students of other religions or alternatively, limiting the number of students of its own religion if such admissions would result in the expansion of the student body at a time when the public schools are implementing a desegregation plan.

Either of these choices, admission of non-Jews or refusal to admit Jewish applicants, would be a violation of Jewish religious principles, we submit.

The proposed procedure would also limit the ability of a Jewish community to establish a new Jewish school in particular areas simply because the public schools desegregation plan was being implemented, even though Jewish religious principles require such schools to be established whenever practical.

As we explained—well, in the interests of time, let me just paraphrase. In our previous testimony, we indicated that it is a policy of our organization to foster the establishment of the Jewish day school in any community when the population reached, the Jewish population in the community, reached 5,000 Jews. I say this in connection with the idea that this policy has absolutely—establishing Jewish schools—has absolutely no relationship to desegregation plans being implemented in the public schools.

We also testified that, for historical reasons having absolutely nothing to do with the racial problems in the United States, there are few Jews among the minority populations in the United States. The number of Jewish blacks in the United States, by estimates we can gather, appear to be somewhere between 3,000 and 6,000; the number of orientals and American Indians and other minority groups who are Jewish is virtually zero.

Thus, while Jewish law absolutely forbids any school to discriminate on the basis of race or skin color, and we know of no instance, no one in our organization knows of any instance in which a Jewish school has refused to accept a Jewish student because he, or she, is a member of any minority group, very few Jewish schools, practically speaking, in the United States, have, or could have, any blacks, orientals, or other minorities among their student body.

For this reason, Mr. Chairman, as a general matter, we fail to this day to understand how any meaningful statistical inference could be drawn from the presence, or lack of, any appreciable members of minorities in particular schools, yet this is what the IRS has proposed to do.

I think my time has run out.

Senator BYRD. You mentioned that there are 3,000 blacks of the Jewish faith?

Mr. RAPPS. I say the estimates we have been able to get. There is no scientific study. It goes nowhere beyond 6,000. We did a survey of various publications.

Senator BYRD. How many persons in the United States are of the Jewish faith?

Mr. RAPPS. Of the Jewish faith, I would say, as a guess, between 8 or 9 million.

Senator BYRD. Eight or nine million with 6,000 being black? You would have a pretty tough time getting 20 percent in your schools, would you not?

Mr. RAPPS. The interesting thing is we had suggested—we took a position in opposition to the numbers game, which we really cannot buy. We want to be particular in our comments.

If a procedure of that sort is going to be imposed upon us, at the very least, the standard should be addressed to the Jewish black or minority population, not to the general population. This was brought to the attention of the IRS initially. They changed the regulation, but simply did not go far enough.

Conceivably, at this time, our schools in certain circumstances—I think it is fair to say it is limited now to the changes they incorporated, but the fact is, conceptually at some point in time, some of our schools can be required to accept non-Jews in order to comply with the standard of 20 percent of the general minority population of a particular area, even though it would have no relationship to the actual numbers of black Jews or minority Jews.

Senator **Byrd**. Thank you, sir.

The next witness?

STATEMENT OF CHARLES B. HIRSCH, EXECUTIVE SECRETARY SEVENTH-DAY ADVENTIST, K-12 SCHOOLS

Mr. **Hirsch**. The Seventh-day Adventist Church began operating its schools over a century ago and today is responsible for the second largest Protestant parochial school system in the United States, and the largest such system in the world. Seventh-day Adventist schools are not merely church related or church sponsored. They are truly church schools. They are an integral part of the religious mission of the church. Our schools would find it almost impossible to operate outside the church and the church would have a difficult time existing without its schools.

In these church schools, the entire curriculum, including extracurricular activities, are enmeshed with the church's teachings and practices. Faculty and staff, and approximately 85 percent of the students are Seventh-day Adventists.

The significant financial investment of the church and its members give evidence of a strong dedication and commitment to a program of church school education.

IRS Commissioner Jerome Kurtz has stated that the IRS guideline and procedures deny tax exemption to private schools that discriminate in their admissions policy on the basis of race or ethnic origin. Church-related private schools are covered within this policy, as well as the churches that operate and control them.

This is rather an inclusive statement with all types of ramifications for church-and-state affairs.

In the same speech, Commissioner Kurtz also referred to *Reynolds* v. *United States*, 98 U.S. 145 (1879) where the Supreme Court of the United States found within the religious clauses of the first amendment both a freedom to believe and a freedom to act. It found that the former is absolute while the latter is not. There is an inherent danger in this interpretation which could eventually eliminate freedom of religious expression.

For example, a person has the absolute freedom to believe in transubstantiation, but his freedom to express this belief through participation in the Mass could be readily curtailed if the government somehow concluded it was contrary to a compelling public interest.

Since its hearings on the first proposed guidelines, I believe the IRS recognizes the complications in finding Amish blacks or Hispanics, or Hebrew blacks, to fill even minimum quotas. The question is who will be the final arbiter in determining what is possible or not possible?

Senator **Byrd**. Thank you, Mr. Hirsch.
Mr. Reed?

STATEMENT OF GEORGE REED, GENERAL COUNSEL, U.S. CATHOLIC CONFERENCE

Mr. **Reed**. Thank you, Mr. Chairman, on behalf of the U.S. Catholic Conference, we wish to thank the subcommittee for the opportunity of commenting upon the proposed revenue procedure. At the outset, I wish to say that this revised procedure is more flexible than the original procedure. Nevertheless, we feel it is unnecessarily burdensome and it presents some critical constitutional issues which need more extended review.

We have 10,000 elementary and secondary schools, representing about 70 percent of the student enrollment in that category. Consequently, we are definitely concerned.

A profile of our school system indicates that we have a minority enrollment of 17.5 percent. That is about evenly divided between black student enrollment and Hispanic student enrollment, the balance being Asiatic and Indian students.

In addition to this, about 85 percent of our dioceses, have established a procedure which precludes the transfer of public school students to our schools when their public school is subject to a desegregation order. We have had to go to court, and have gone to court, in order to enforce that policy.

I would like to mention a new development which presents this whole issue in a new light. Last month, the Supreme Court of the United States, in the case of *NLRB* v. *Catholic Bishop of Chicago*, rendered a very important decision. It stated that administrative agencies cannot construe congressional statutes in a manner that gives rise to serious first amendment issues, unless there is a clear expression of Congressional intent.

We submit that there is no clear expression of congressional intent in any of the history of section 501(c)(3) of the Internal Revenue Code to support the issuance of guidelines regulating the admissions and employment practices of church-related schools. This decision, with its basic rationale, in my opinion imposes on the IRS the duty to review this revised procedure in light of this new rationale by the court, in order that IRS may eliminate any unconstitutional aspects of the revised procedure.

I have another major concern—while this procedure is more flexible than the first one, it is only more flexible because the public has an opportunity for comment.

The Service in this particular situation was not required to provide opportunity to comment, but it did so. However, in many other instances directly effecting tax status of 501(c)(3) institutions, including the churches, IRS has published rulings without any opportunity for comment whatsoever.

The Commissioner today made reference to Revenue Ruling 5-231. If a school discriminates, the sponsoring church would lose its exemption. No opportunity was afforded for comment with respect to that ruling.

There are other areas similar to this. I suggest that the Congress seriously consider the enactment of legislation which would provide that the Internal Revenue Service, whenever it intends to publish a ruling which has the potential of affecting the tax status of a 501(c)(3) institution, should be required to comply with the Administrative Procedures Act. That is, there should be a notice of rulemaking and opportunity for comment.

Thank you very much, Mr. Chairman.

Senator BYRD. Thank you, Mr. Reed.

During the recess of this committee, I spent 1½ hours on the steps of the Capitol with the students from the Liberty Baptist College of Lynchburg, Va. They had an "America Day Rally" there. They had 12,000 persons present, as estimated by the police.

Now, I tried to count in the choir whether there was a 20 percent racial of black and white. I could not figure whether they quite did or not; I do not think they did. I assume that most of the persons who attend Liberty Baptist College are Baptists and attend because they want to go to a Baptist college. I assume that most of those who attend the Hebrew day schools are Jewish. It seems natural that they would like to go to such a school. I assume most of the Catholic schools are predominantly Catholics, because that is what the Catholics would like to do. You mentioned 85 percent of the students at the Seventh-day Adventist schools are members of that faith. We are getting into problems by setting goals or quotas for religious institutions. I think your testimony today has been most helpful.

Mr. Lamborn stated that he felt the Government should not assume guilt when there is no evidence of guilt. Certainly I think that is a reasonable view to be held by an American citizen. You mentioned, Mr. Lamborn, that you feel that the Government should direct attention to schools which are discriminating but not to harass schools which are not discriminating. To me, that seems to be an American doctrine.

I think it is well-established. It is certainly well-established by what each of you have said, and what other witnesses have said. That no one here is defending discrimination; that is not the point. The point is to give authority to the Internal Revenue Department to act in cases where there is discrimination. But what you gentlemen are objecting to, on behalf of those whom you represent, as I understand it, is the sort of blanket viewpoint that everybody is discriminating unless you prove they are not discriminating.

Thank you very much.

[The prepared statements of the preceding panel follow:]

TESTIMONY OF ROBERT L. LAMBORN, EXECUTIVE DIRECTOR, COUNCIL FOR AMERICAN PRIVATE EDUCATION

SUMMARY OF TESTIMONY

The Council for American Private Education (CAPE) is a coalition of 15 national organizations serving private schools (K-12) which enroll approximately 90 percent of the children attending private schools. CAPE, its member organizations, and the schools they serve actively support a policy of racial non-discrimination. We endorse the civil rights purposes of the proposed revenue procedure and believe that the tax-exempt status should be denied to private schools which in fact discriminate on the grounds of race

We believe that as a body private schools should be judged by their positive record on civil rights matters, not by the performance of the relatively quite small proportion of the private schools which may in fact operate in a racially discriminatory way. We believe, also, that in drafting revenue procedures relating to tax-exempt private schools great care should be taken to focus on schools which are in fact discriminatory and to protect those which are in fact nondiscriminatory in their practices.

The proposed procedure of February 9, 1979, clearly reflects the serious efforts IRS has made to be responsive to those concerns. There remain, we believe several matters of principle which should be addressed, as well as a number of points which should be clarified. Our principal specific points in our full testimony are those related to the following sections: Sec. 2.01 and 2.02 (The procedure should reaffirm that a religious school may select its students from its religious membership if the denomination is non-distriminatory); Sec. 3.03(c) (There should be no presumptions of discrimination—all actions should be based on a finding based on all the facts); Sec. 3.04 (The procedure should be further adapted to the fundamental differences between the character of the communities served by public and private schools); Sec. 4.03(1) (Any evaluation of a school's good intent should be realistic in terms of the school's resources and no school of good intent should be faced with unmanageable burdens of defense); and Sec. 5.03, 5.04, and Sec. 7 (No adverse actions against the deductibility of contributions should be initiated prior to a final determination of fact).

I am Robert L. Lamborn, Executive Director of the Council for American Private Education (CAPE). CAPE is a coalition of 15 national organizations serving approximately 15,000 schools (K-12), enrolling approximately 4.2 million children or approximately 90 percent of those attending private Schools. CAPE and its member organizations are non-profit. They and their member schools actively support a policy of non-discrimination on grounds of race, color, and national origin. The membership: The American Lutheran Church, The American Montessori Society, Association of Evangelical Lutheran Churches, Association of Military Colleges and Schools of the U. S., Christian Schools International, Friends Council on Education, Lutheran Church-Missouri Synod, National Association of Episcopal Schools, National Association of Independent Schools, National Association of Private Schools for Exceptional Children, National Catholic Educational Association, National Society for Hebrew Day Schools, Seventh-day Adventist Board of Education, K-12, Solomon Schechter Day School Association, and United States Catholic Conference.

We wish to underscore at the outset of our testimony that CAPE endorses the civil rights purposes of the proposed revenue procedure and that the vast majority of private schools are conducted in a racially non-discriminatory manner. One evidence of the degree of CAPE's commitment to this purpose is that at both the Appeals and Supreme Court levels we entered amicus briefs in support of the black parents in Runyon v. McCrary, a suit which was found in favor of the parents and against the schools involved. We believe that as a body private schools should be judged by their positive record on civil rights matters, not by the performance of the relatively quite small proportion of the private schools which may in fact operate in a racially discriminatory way. We believe, also, that in drafting revenue procedures relating to tax-exempt private schools great care should be taken to focus on schools which are in fact discriminatory and to protect those which are in fact non-discriminatory in their practices.

We welcome the invitation to comment on the Proposed Revenue Procedure on Tax-Exempt Schools issued February 9, 1979. We consider the matter to be of major importance to the future of America's private schools and to American education. CAPE appreciates the careful attention which IRS Commissioner Kurtz and his associates have given to the concerns which have been expressed by private school representatives with regard to the proposed procedure of August 22, 1978. The proposed procedure of February 9, 1979, clearly reflects the serious efforts IRS has made to be responsive to those concerns. There remain, we believe, several matters of principle which should be addressed, as well as a number of points which should be clarified.

Sec. 2.01 and 2.02—In reaffirming the application of racial non-discrimination to religious schools (2.01), the IRS should at the same time reaffirm that a religious school may select its students from membership in the religious denomination if the latter is non-discriminatory (see Rev. Proc. 75-50, Sec. 3.03), and that this preference or priority does not constitute racial discrimination. The proposed revenue procedure does not affirmatively state this principle which is fundamental to the application of the racial non-discrimination policy to religious schools. (This will be our only comment on the fundamental church-state issues which are raised by the proposed procedure. Others will address the issues as they feel it appropriate.)

Sec. 3.03(a)—It would be helpful to clarify the procedure for determining the dates which will establish the limits of the period of the public school desegregation process. At what point does "implementation" start and at what point has "substantial implementation" been achieved? How and by whom are these judgments made and these dates set? To whom should the private schools and IRS look for definitive answers?

Sec. 3.03(a)—It would be helpful to clarify what is meant by a "voluntary plan" of public school desegregation if the term covers more than a written desegregation plan entered into with the Department of Health, Education and Welfare (HEW), or with a state agency plan, which the procedure includes, "for example."

Sec. 3.03(b)—It would be helpful to make clear that the terms "Special program" and Special curricula" as used here should be broadly construed to include programs and curricula reflecting the schools' announced theological and philosophical commitments.

Sec. 3.03(b)—While we appreciate the IRS objective in establishing the 20 percent safe harbor test, we believe that the test can be easily misconstrued as meaning that a school not meeting this standard has an insignificant minority enrollment, that the test is not based on legislative or federal court decisions, that the test is not now controlling or necessary in the light of Section 3.03(c), and that it should therefore be deleted.

Sec. 3.03(b)—We strongly support the new provisions for dealing with schools in systems. They serve to recognize the fact that while individual private schools in a system will udnerstandably vary in the racial mix of their students, they should be judged as members of a system which has a common commitment to the active support of a policy of racial non-discrimination. It would be helpful, however, to clarify the nature of a "system" in this context, since the systemic nature of private schools varies considerably from one category of schools to another. Some schools are integral parts of extensive systems. Some, although independently owned and managed, are closely joined in a clearly stated common purpose. Together they may be considered as a "system of schools" rather than a "school system". Others are completely independent institutions associated for a sharing of resources in support of their mutual purposes. Schools in such associations may operate under an established general policy in support of racial non-discrimination—as does the National Association of Independent Schools, for example—and thus, broadly interpreted, may be seen as a system. At the same time it should be made clear that this provision should in no way place a "well-intended" single school in greater jeopardy than schools in systems, however defined.

Sec. 3.03(c)—We do not believe that ordinarily the formation or substantial expansion of a private school at the time of a public school desegregation in the community should be assumed "to be related in fact to public school desegregation". This is a point of major disagreement with the proposal. We believe, to the contrary, that the relationship in fact should be based upon objective evidence, taking into account all the facts and circumstances related to the school's formation or expansion. There should be no presumptions of guilt.

The presumption of fact is, in our mind, clearly untenable. It reflects a pervasive bias against the private schools—a tendancy to assume the worst of them and to place the burden of proof upon them—which was evident throughout the August 22 procedure. This bias is considerably less evident in this modified procedure and should, in fairness, be eliminated entirely.

Sec. 3.03(c)—The list of facts which are to be taken as tending to indicate that the formation or substantial expansion of a school was not related in fact to public school desegregation is a constructive addition. We believe the following facts might well be added to the list:

The expansion is attributable to going from a single sex to a co-educational student body.

The expansion is attributable to improved school plant, or curricular innovations, or improved staffing, or changed administration policies and procedures which in no way reflect a racially discriminatory stance but do increase the schools appeal to a broader clientele.

Sec. 3.03(c) (1) and (9)—While the principle of Sec. 3.03(c)(1) is sound in judging that a school's expansion is not related to public school desegregation if the students are not drawn from the public schools which are desegregating, it is in no sense equally sound to determine, Sec. 3.03(c)(9), that a school's enrollment growth is in fact racially motivated simply because "the students who enroll are primarily drawn from the public schools." After the first grade, the pool of potential students upon which a private school can draw generally includes a very high percentage who are enrolled in public schools. It would be unusual if they were drawn primarily from any other source.

Sec. 3.04—The presently proposed definition of "Community", while a marked improvement over the earlier definition, still disregards the factors other than geographic which describe the nature of a private school community. In the simplest instance, a private school community may be defined as the religious community which owns and operates a religious school and the families it serves. It will often bear little relation to neighboring public school districts. In another instance, a school's community may have coalesced around a highly complex set of interrelated socio-economic-philosophic factors. This school's community, too, will bear little or no relationship to the geographic boundaries of neighboring public school districts. The procedure should be further adapted to the fundamental differences between the character of communities served by public schools and of those served by private schools.

Sec. 3.04—It would not be sound practice for the IRS to determine minority school population by relying on statistics compiled by HEW on public school enrollments, nor would it be reasonable to require the private school to furnish "acceptable statistics relating to its community showing both public and private school enrollments". Any proportional test of minority enrollments should be based on the total school population and the burden of gathering the related statistics should be borne by the government, not the private schools. As the result of collaborative efforts by HEW's National Center for Education Statistics (NCES), CAPE, and the National Catholic Educational Association over the last four years, reasonably accurate current data is now available from NCES.

Sec. 3.05—Since 1970, when the IRS announced during litigation the revised policy that tax-exempt status would be denied private schools which racially discriminate, the legal authority for that position has not rested on specific legislation. The IRS has relied on the common law principle that to be treated as a charitable organization, an organization must not operate illegally or contrary to public policy, and articulated the public policy in terms of *Brown v. Board of Education*, Title VI of the Civil Rights Act of 1964 and a string of Fourteenth Amendment case findings that Federal and State government cannot assist private schools that practice racial discrimination. The broad definition of "minority" in the February 9, 1979 proposed revenue procedure is consistent with the IRS rationale. The three judge district court in the *Green* case (330 F. Supp. 1150) upheld the IRS approach in 1970 while suggesting it was mandated by the constitution, but the district court in the *Bob Jones* case has categorically rejected it (D.S.C., Dec. 28, 1978, Civ. Act. No. 76-755). The Supreme Court has not passed definitively on this question.

Some have suggested that the indirect benefits of tax exemption should be considered federal financial assistance for purposes of Title VI of the Civil Rights Act of 1964, but this view is not supported by the legislative history of the act and has been soundly criticized by commentators. CAPE would vigorously oppose resting the authority of the IRS for the revenue ruling prohibiting racial discrimination in private schools on Title VI. If accepted, it would follow that other federal statutes which apply conditions to direct recipients of federal aid would also apply to private schools, a position which CAPE believes is legally insupportable and indefensible as a matter of education policy.

We believe that as a matter of public policy, the Congress might wish to consider legislation which would provide explicit authority for the IRS position while, at the same time, limiting the discretionary power of the IRS to change or expand "public policy" applicable to tax-exempt private schools. Fundamental public policy affecting private schools should not be made by the IRS in response to litigation against it, particularly when schools are not party to the litigation. The issuance of regulations in this setting is clearly an unacceptable means of making wise policy choices. The Congress would do well to take the lead in setting fundamental policy in this important area.

Sec. 4.03—While it is reasonable to require that actions and programs designed to attract minority students should be framed with the clear intent of notifying the affected minority community that the school is in fact operating in a non-discriminatory manner, the efforts should be judged by reasonable standards of performance rather than by the subsequent perception of the minority community which may conceivably not be amenable to persuasion.

Sec. 4.03(1)—The specified actions and programs would indeed contribute to attracting minority students on a continuing basis. It would be essential in any reasonable evaluation of a school's performance in these areas, however, to make these judgements on the basis of a realistic appraisal of the school's resources in terms of personnel and finances. There should be a reasonable equating of efforts to resources. Conscientious efforts should be made to see that small, financially hard-pressed schools of good intent are not swept into the "reviewable" category under Sec. 3 and faced with unmanageable burdens of defense under Sec. 4.

Sec. 4.03(3)—It would be helpful if it were made clear that in evaluating a school's efforts to recruit minority teachers and other professional staff attention should be paid to factors which may be expected to limit the success of these efforts. One such factor, for example, is that the salary levels in private schools are generally substantially below those in public schools.

Sec. 4.03—The concluding judgement that "The failure of such actions and programs as are suggested in this section to obtain some minority student enrollment within a reasonable period of time will be a factor in determining whether such activities are adequate or are undertaken in good faith" appears unjustified. The test should be whether the efforts are reasonably well-conceived and reasonably vigorous, rather than whether, given the school's special circumstances, they are successful.

Sec. 5.03, 5.04, and Sec. 7—The advance assurance of deductibility of contributions is vitally important to the financial well-being of many private schools. Often tuition charges cover only a portion of operating costs, and a school depends on alumni, parents and friends for gifts and donations to cover the remaining portion. In many cases, scholarship programs are almost entirely dependent on deductible contributions. The withdrawal of advance assurance of deductibility before a school has the opportunity to seek a final court decision on the question of racial discrimination would place private schools in a position significantly worse than that of public schools. Under Title VI of the Civil Rights Act of 1964, Congress has assured public schools of a formal notice, a hearing before an impartial administrative law judge, and a review by the federal courts before fund termination.

We believe this matter is of fundamental importance, and the IRS should revise the proposal to assure that no adverse actions against the deductibility of contributions are initiated prior to final court action. In the alternative, the Congress should enact legislation to this end. Present S 7428 of the Code does not meet this concern.

While a final decision on a question of discrimination by a particular school is better made in the IRS National Office than in the IRS District or Regional offices, there is a fundamental difference between a decision made by a court of law and a decision made by an administrative agency. This difference is particularly significant when the administrative agency makes broad decisions in litigation without involving representatives of all of the parties involved (as the IRS did in the *Green* case, where private school representatives were not involved and motions for further relief are still pending against the IRS).

We conclude that fairness dictates that no adverse action should be taken by the IRS against a private school or those who support it until that school has had its day in court and been judged to be racially discriminatory.

Concluding, we wish to express again our appreciation for the careful attention which is being given to these proposed procedures by Congress and the Administration. We believe that our pluralistic society draws great strength from the presence of strong public and private schools serving the public need in complementary ways. The tax-exempt status of racially non-discriminatory private schools is related in vital ways to their institutional viability and their capacity to serve all elements of our society.

CAPE is eager to continue to cooperate in devising a sound revenue procedure. Because of the importance of the underlying rationale involved in the development of law through rulemaking, we urge this Committee to request the IRS, when it issues the final revenue ruling in this matter, review and publish its responses to the comments on the August 22, 1978, and February 9, 1979, proposals.

STATEMENT OF GEORGE E. REED, GENERAL COUNSEL, UNITED STATES CATHOLIC CONFERENCE

Mr. Chairman, on behalf of the United States Catholic Conference we thank the Subcommittee for this opportunity to present testimony concerning the revised procedure proposed by the Internal Revenue Service relating to the racially nondiscriminatory policies of private schools.

Revised proposed procedure

The proposed procedure, as first published on August 22, 1978, was unreasonable and would have imposed extreme burdens upon Catholic schools. The revised procedure published on February 13, 1979 is an improvement on the original proposal. However, there are certain aspects of the revised procedure which would be objectionable if applied to Catholic schools.

Catholic schools

As part of its teaching mission the Catholic Church operates approximately 10,000 elementary and secondary schools in this country. Parish schools comprise the vast majority of Catholic schools. Parishes are established to serve the needs of Catholics when sufficient numbers of Catholics exist in particular geographical areas. As soon as possible a parish church is erected, and, when feasible, a parish school is established. Ordinarily, the school begins with the lower numbered grades, with additional grades being added as the situation warrants.

Catholic schools are operated on a racially nondiscriminatory basis and enroll significant numbers of minority students. Over the past ten years the percentage of minority students enrolled in Catholic schools throughout the country has increased from 10.8 percent to 17.1 percent. Many Catholic schools located in urban areas have substantial minority enrollments. For example, in New York City minorities constitute 38 percent of the students enrolled in Catholic schools. In Manhattan the figure is 76 percent.

In many areas where public school desegregation plans are being implemented the Catholic Church has taken steps to prevent the use of Catholic schools as a means of avoiding desegregation by adopting policies which prohibit the acceptance of students seeking to transfer from public schools undergoing desegregation. This type of policy has been defended successfully in the highest court of one state.

The position of the Catholic Church against racial discrimination is clear. It is a position long held by the Church.

Application of the revised procedure to Catholic schools raises serious first amendment issues

In the recent decision in *NLRB* v. *Catholic Bishop of Chicago* (March 21, 1979) the U.S. Supreme Court ruled that administrative agencies cannot construe statutes in a manner which gives rise to serious First Amendment questions in the absence of a clear expression of Congressional intent to do so. There is no clear expression of Congressional intent in any of the history of section 501(c)(3) of the Internal Revenue Code to support the issuance of guidelines regulating the admissions and employment practices of church-related schools. In the absence of clear Congressional intent IRS is required to promulgate a procedure which will avoid serious constitutional questions.

It is conceivable under the revised procedure that IRS may require Catholic schools to actively recruit non-Catholic students and teachers. This would be a clear violation of the First Amendment. Catholic churches will be pressured to conform the operation of their schools to comply with those methods of operation approved by IRS in the revised procedure. This will have a chilling effect on the normal operations of Catholic schools.

Defining the community served by Catholic schools in terms of the community served by public school districts is unreasonable. The communities served by Catholic schools and public school districts differ both in terms of geography and population. To ignore this reality in the procedure undermines the First Amendment rights of Catholic schools.

Due process requires that the burden of proof with respect to racial discrimination lie with IRS

The revised procedure contains a presumption that any school formed or substantially expanded at the time of public school desegregation is operated on a racially discriminatory basis. The burden of proof with respect to the issue of racial discrimination lies with the private schools. In effect, schools will be required to prove an absence of violation of law, that is, an absence of racial discrimination.

To place such a burden on private schools is a violation of due process. In *Norwood* v. *Harrison*, 93 S. Ct. 2804 (1973), the Supreme Court made it clear that private schools could not be required, consistent with due process, to prove the absence of racial discrimination. In any action denying or revoking exempt status because of racial discrimination, the burden should be on IRS to show, after consideration of all relevant facts, that a school in fact operates in a racially discriminatory manner.

Recommendation for legislation

The concerns which we have expressed here today are meant to be constructive. We can appreciate the difficulty facing the Service in its attempt to fashion a test for discrimination. What constitutes racial discrimination is a complex issue which does not lend itself to resolution through simple formulas or procedures.

In this respect we note that the revised guidelines have been published as a proposed revenue procedure with an opportunity to submit written comments. Because of the manner of publication (as a proposed revenue procedure) the comment period may not be required by the Administrative Procedure Act. The improvements in the revised guidelines are the result of comments and input contributed by interested parties and demonstrates the necessity for public comment. The need for a public comment period is particularly acute in situations such as this, where agency action imperils a broad class of 501(c)(3) organizations, or where it projects critical constitutional considerations.

IRS in the past has issued new guidelines affecting churches and religious organizations in the form of revenue rulings. This occurred in Rev. Ruling 75–231, revoking the exemption of a church which sponsored a racially discriminatory school, and Rev. Ruling 78–248, relating to voter education. These rulings were issued, at least to our knowledge, with little or no input from the churches affected by the rulings. When agency action affects the exempt status of a broad class of 501(c)(3) organizations, such action should be the subject of rulemaking procedures under the Administrative Procedure Act. We recommend that Congress consider legislation requiring rulemaking procedures in such situations. The opportunity to comment is essential to insure fair and equitable treatment of the affected organizations.

Statement of Charles B. Hirsch, Executive Secretary, Seventh-day Adventist, K–12 Schools

The Seventh-day Adventist Church began operating its schools over a century ago and today is responsible for the second largest Protestant parochial school system in the United States, and the largest such system in the world. Seventh-day Adventist schools are not merely church related or church sponsored. They are truly church schools. They are an integral part of the religious mission of the church. Our schools would find it almost impossible to operate outside the church and the church would have a difficult time existing without its schools.

In these church schools the entire curriculum, including extracurricular activities, are enmeshed with the church's teachings and practices. Faculty and staff, and approximately 85 percent of the students are Seventh-day Adventists.

The significant financial investment of the church and its members give evidence of a strong dedication and commitment to a program of church school education.

On the question of integration and nondiscrimination, the church and its institutions—schools, hospitals, and publishing houses—are giving support, not just in theory, but in practice as well.

The revised proposed IRS guidelines are a vast improvement over the previous ones, and perhaps, for the independent, or private, nonchurch schools, they may be more easily accommodated. At this point it should be recognized that the IRS guidelines are aiming to right a wrong, and this is commendable, but their implementation insofar as church schools are concerned requires some considerations which cannot be ignored.

Basically, the issue is not one of race. It centers on the First Amendment and the question of religion. Essential to the great American tradition of separation of church and state is the status of tax exemption. In this situation we have a governmental agency attempting to impose a program of racial and ethnic quotas resulting from statistical consequences. With its threat of removing tax exemption, this agency is not only attempting to have a voice in the admissions policy of private schools, but is actually interfering in the affairs of the church. It is mandating guidelines which many religious schools will be unable to satisfy.

If, in effect, the IRS can intrude in the operation of a church school, an integral part of the church, in this fashion, how long will it be before racial quotas are set for the administration or hierarchy of the church? And what about the congregation itself?

Certainly, if the U.S.A. is to maintain the option and choice for its citizens in matters of religion and culture, it should weigh carefully the principles involved in removing the tax exemption from church schools and, in effect, churches.

IRS Commissioner Jerome Kurtz has stated that the IRS guidelines and procedures "deny tax exemption to private schools that discriminate in their admissions policy on the basis of race or ethnic origin. Church-related private schools are covered within this policy, as well as the churches that operate and control them."[1]

This is rather an inclusive statement with all types of ramifications for church-and-state affairs.

In the same speech, Commissioner Kurtz also referred to *Reynolds* v. *United States*, 98 U. S. 145 (1879), where the Supreme Court of the U. S. found within the religious clauses of the First Amendment both a freedom to believe and a freedom to act. It found that the former is absolute while the latter is not. There is an inherent danger in this interpretation which could eventually eliminate freedom of religious expression.

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[1] Jerome Kurtz, before the PLI Seventh Biennial Conference Tax Planning for Foundation Tax-Exempt Status and Charitable Contributions, New York City, January 8, 1978, p. 8.

For example, a person has the absolute freedom to believe in transubstantiation, but his freedom to express this belief through participation in the Mass could be readily curtailed if the government somehow concluded it was contrary to a compelling public interest.

Since its hearings on the first proposed guidelines I believe the IRS recognizes the complications in finding Amish Blacks or Hispanics, or Hebrew Blacks, to fill even minimum quotas. The question is who will be the final arbiter in determining what is possible or not possible?

In the new guidelines, the definition of "community" leaves much to be desired insofar as church schools are concerned. The "community" or constituency supporting a church school could be one or more churches, or a whole conference of churches. Some church constituencies, in spite of an open membership policy, are all black or all white depending on the geographical locations. Therefore, for a church school, the public school district is not at all relevant! Also, the section on a "system of schools" needs further clarification and explanation.

In conclusion, the Seventh-day Adventist Church is sympathetic with the goals of the IRS to encourage nondiscrimination. This is part and parcel of our belief. We must, however, express strongest reservations and a deep concern over the future implications of such guidelines. Without question fundamental liberties affecting our religious beliefs would be endangered. In addition, the financial burdens which would be imposed could bankrupt many of these church schools, where strong moral and religious values are taught in preparation for good citizenship.

Senator **Byrd**. The next panel will be a 10-minute panel, 5 minutes each. Mr. Lipman Redmen, chairman, section on taxation, American Bar Association and Mr. Philip J. Murren, attorney, Harrisburg, Pa.

Welcome, gentlemen, and you can decide who would like to proceed first.

STATEMENT OF PHILIP J. MURREN, PRESENTING THE TESTIMONY OF WILLIAM BALL, ATTORNEY, HARRISBURG, PA.

Mr. **Murren**. I am Philip J. Murren. I am here to deliver the testimony of William B. Ball. Mr. Ball was detained elsewhere on litigation matters. Mr. Ball is my partner in the firm of Ball & Skelly, Harrisburg, Pa. He is a member of the bars of New York and Pennsylvania, as well as the Supreme Court of the United States and various other Federal courts. He is past National Chairman of the Committee on Constitutional Law of the Federal Bar Association and has long been active in the field of constitutional litigation, both in the area of racial civil rights and in the field of religious liberty.

He has served as the attorney for the National Committee for Amish Religious Freedom since its founding and, in that role, has defended the Amish in *Wisconsin* v. *Yoder*. My appearance here today is as an individual attorney.

It is the fact that the Proposed Revenue Procedure brings together both of these areas—race and religion—which especially interests me in these hearings. Two kinds of minorities are involved here not one: racial minorities and religious minorities. I am deeply concerned, as a citizen and as a lawyer, that IRS has proceeded upon the totally false assumption that regulation to combat racial discrimination necessarily nullifies the exercise of First Amendment rights including parental rights and religious liberty—and that while racial minorities are to be aided by our tax laws, religious minorities are to be placed in a suspect class in the administration of those laws.

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I am concerned, too, over IRS's assumption that the Congress has given IRS the indefinitely broad powers which it expresses in this proposal.

I am concerned about a third thing. Only a very small percentage of all school children in the nation are enrolled in private schools, and most of these schools are religious schools. While the great number of religious schools with which I am familiar reject, on religious grounds, the immorality of hurting, depriving or diminishing of anyone on account of the race with which God has clothed him, I cannot but wonder over the intensive zeal with which IRS is pushing its effort here today. And when I reflect that all religious schools—Catholic, Missouri Synod, Orthodox Jewish, Quaker, fundamentalist Christian, Amish, and others—will suffer a major imposition upon their religious freedom if the proposal is adopted—I cannot but wonder if we are not faced with an essential hostility, upon the part of some public servants, to non-state education, a reappearance of official horror of pluralism, privacy, and real religious freedom to which *Pierce* v. *Society of Sisters* was so great a response.

As I have reviewed the proposed revenue procedure, I have found only two conclusions possible: one, it is unlawful in that it is without statutory authority; two, it is unlawful in that it violates constitutionally guaranteed liberties.

A revenue procedure is intended as law for a nation of 220 million people. All would agree that the proposal before your subcommittee today is one of extreme importance. The IRS claims it is that. Certainly it pertains to such weighty matters as racial discrimination, the ongoing life of churches, liberties of parents, revenues for our Government, tax liabilities of citizens, and the operating of thousands of schools.

It would be astonishing to imagine that any such measure would be put forward unless it were clearly authorized by the Congress. It would be more astonishing if the proposal were founded on a flotsam of inferences from Supreme Court decisions, predictions as to how the court will "surely" act, IRS's own precedents, official gossip about the fundamentalist schools, and the subjective social views of brother citizens who happen to be public servants. Yet that, unhappily, is the case.

Chief among the reasons advanced in support of the IRS assertion that it possesses the necessary authority to adopt the Procedure is the claim that the affirmance, by the United States Supreme Court, of the decision of the Federal District Court for the District of Columbia in the case of *Green* v. *Connally,* acts as an unassailable stamp of approval upon IRS's present interpretation of section 501. Yet the Supreme Court, in 1974, noted that IRS had reversed its position during the course of the *Green* litigation, and because of that reversal, its affirmance in *Green* lacked "the precedential weight of a case involving a truly adversary controversy." 416 U.S. 725, 740 (fn. 11) (1974). The Court flatly stated that "The question of whether a segregative private school qualifies under 501(c)(3) has not received plenary review in this court."

IRS has misread the plain language of Section 501(c)(3) in urging that all religious organizations also exhibit all of the elements of a common law charitable organization, including conformity to the public policy of the day, in order to be considered exempt under that section. Section 501(c)(3) exempts organizations organized for religious or charitable purposes, not organizations organized for religious and charitable purposes. There is thus no basis whatever in the language of the section for importing the common law of charities into the section's requirements. Yet this IRS has admittedly done.

Apart from the threshold problem of lack of statutory authority for the proposed revenue procedure is a series of features of the proposal which render it inescapably unconstitutional.

Many—perhaps most—religious schools are not part of any system of commonly supervised schools. They exist instead as integral parts of the religious teaching mission of independent churches. Yet IRS, in its proposal, accords a degree of latitude to those church schools which are part of a system which it does not similarly accord to independent church schools.

The question is thus presented: May the religious liberty of any church be made to depend upon its being part of a system? It is plain, however, that Government may not condition religious liberty upon conformance to a scheme of ecclesiastical organization favored by Government.

I would conclude, Senator, by simply saying that loss of exemption from Federal taxes is a serious burden to a church school. Avoidance of that loss may not be made to depend upon conformity by a church to a favored Government policy, or upon abandonment of a constitutional right without a clearly expressed congressional mandate which, itself, represents the least restrictive means of achievement of, not just a legitimate Government interest, but of a compelling state interest.

The IRS proposal is neither clearly mandated by statute nor preservative of rights of religious minorities.

Thank you, Senator.

Senator BYRD. Thank you very much.

You mentioned the Amish. Are there many black Amish?

Mr. MURREN. None that I know of, Senator.

Senator BYRD. None. You would have difficulty meeting the 20-percent quota, I suppose.

Mr. MURREN. Yes, sir, they would.

Senator BYRD. The Amish are a very fine people. They are a little stricter, my impression is, than many Americans. In my own State, near where I live, we have many Mennonites, which are similar to the Amish, I believe. They, too, I understand, have their own schools and their own curricula. They, like the Amish, would have difficulty in complying with many of these proposed regulations.

The next witness will be Mr. Lipman Redman, chairman of the section on taxation, American Bar Association.

STATEMENT OF LIPMAN REDMAN, CHAIRMAN, SECTION ON TAXATION, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY MICHAEL I. SANDERS

Mr. REDMAN. Thank you, Mr. Chairman.

I should explain at the outset that, although I am chairman of the tax section, that I am not here today in that capacity. I am here, rather in a legal capacity as a tax lawyer and I am accompanied by Michael Sanders who is also active in the Tax Section and is likewise here only in his individual capacity.

I take it that for the purpose of this hearing this morning and the hearings outside and elsewhere that Mr. Sanders and I play a unique role in our presence here today in the fact that we are primarily here as tax lawyers. I am not sure that the chairman and the committee are as aware of the views of the tax lawyers as they are the civil rights lawyers and the different religious and other groups. We are here because we are concerned over the large amount of response submitted to the Commissioner and to the Congress in regard to a fundamental fact.

That is, the right of the Commissioner to take the action at all. Putting aside, for the moment, how the Commissioner proposes to exercise this power, we do submit, for your consideration, our sound belief that the Commissioner does, indeed, have the power to take action in this regard, to administer this section of the Internal Revenue Code, just as he has the power and the obligation to administer, as best he can, the other provisions of the Internal Revenue Code.

Many tax lawyers active in the field have always understood that the decision of the Supreme Court in 1971 in *Green* v. *Connally* did, indeed, stand for the proposition that a school which engaged in racial discrimination was not entitled to a U.S. tax exemption. Admittedly, the Supreme Court acted upon this proposition by a footnote in the 1974 decision in the *Bob Jones University* case. I suggest, however, that that footnote, which is indicative of the case before the court at that time, does not really cast any serious doubt on the proposition that the court did announce in *Green* v. *Connally*.

I suggest that there are two answers to that point. One is the only Federal court decision directly on points since that decision makes that point, namely that a school practicing racial discrimination is not entitled to a tax exemption. That is the *Goldsboro Christian School* v. *United States*, 1977.

In that connection, the *Bob Jones University* case, that court distinguishes the decision in the *Goldsboro Christian School* case by saying it involves a different issue. It does not involve the issue of the right of the school to practice discrimination with a tax exemption, but a subsidiary issue, namely interracial dating.

I do not share that decision. I think that decision is wrong. Nevertheless, it was the only hope by any Federal court since the footnote in the *Bob Jones University* case by the Supreme Court.

An equally persuasive answer comes from the Congress itself. In 1976, Congress enacted 501(i) of the Internal Revenue Code to specify that social clubs which engaged in racial discrimination were not entitled to tax exemptions. In so doing, the Senate Finance Committee report made very clear that the purpose of that provision was to overrule a Federal District Court decision in the *McGlotten* case.

In so doing, the committee report made very clear that Congress understood, as far as private schools were concerned, that *Green* v. *Connally* did, indeed, require that schools not engage in racial discrimination as a condition of its tax exempt status.

There we have Congress stating its understanding in a committee report that they understood, as I have stated, and felt no need to put anything in the Internal Revenue Code.

I think my time is about to expire. I would like to point out, however, that in terms of action by the Congress, that if Congress wants to change a law, Congress has the right to do it. But against the background of the action of the committee that the rules be given a chance to work, they are infinitely better in the present form than they were originally and Congress should refrain from action until we see how the rules actually work in practice.

Thank you.

Senator PACKWOOD. A very fine job. I was reading your statement as you were going, your point being that you are in sympathy with the regulations and that the Commissioner has the power to issue it?

Mr. REDMAN. Yes, sir. I know there are those who would quarrel with that power. At this particular time, it is whether these regulations are the right way to go.

[The prepared statements of the preceding panel follow:]

TESTIMONY OF WILLIAM B. BALL, ESQ.

I am William B. Ball, partner in the firm of Ball & Skelly. Harrisburg, Pennsylvania. I am a member of the bars of New York and Pennsylvania, as well as the Supreme Court of the United States and various other federal courts. I served as national chairman of the Committee on Constitutional Law of the Federal Bar Association for a number of years and I have long been active in the field of constitutional litigation. Some of my activity has been in the area of racial civil rights, in which role I was volunteer counsel during the 1960's to the Pennsylvania Equal Rights Council and counsel to pro-civil rights amici curiae in the U.S. Supreme Court miscegenation and open housing cases. I have also handled much litigation in the field of religious liberty, in which role I have served, for example, as attorney for the National Committee For Amish Religious Freedom since its founding—in that role having defended the Amish in *Wisconsin* v. *Yoder*. I appear here today as an individual attorney.

It is the fact that the Proposed Revenue Procedure brings together both of these areas—race and religion—which especially interests me in these hearings. Two kinds of minorities are involved here not one: racial minorities and religious minorities. I am deeply concerned, as a citizen and as a lawyer, that IRS has proceeded upon the totally false assumption that regulation to combat racial discrimination necessarily nullifies the exercise of First Amendment rights including parental rights and religious liberty—and that while racial minorities are to be aided by our tax laws, religious minorities are to be placed in a suspect class in the administration of those laws.

I am concerned, too, over IRS's assumption that the Congress has given IRS the indefinitely broad powers which it expresses in this Proposal.

I am concerned about a third thing. Only a very small percent of all school children in the nation are enrolled in private schools, and most of these schools are religious schools. While the great number of religious schools with which I am familiar reject, on religious grounds, the immorality of hurting, depriving or diminishing of anyone on account of the race with which God has clothed him, I cannot but wonder over the intensive zeal with which IRS in pushing its effort here today. And when I reflect that all religious schools—Catholic, Missouri Synod, Orthodox Jewish, Quaker, fundamentalist Christian, Amish and others—will suffer a major imposition upon their religious freedom if the Proposal is adopted—I cannot but wonder if we are not faced with an essential hostility, upon the part of some public servants, to non-state education, a reappearance of official horror of pluralism, privacy and real religious freedom to which *Pierce* v. *Society of Sisters* was so great a response.

As I have reviewed the Proposed Revenue Procedure, I have found only two conclusions possible: (1) it is unlawful in that it is without statutory authority, (2) it is unlawful in that it violates constitutionally guaranteed liberties.

I. THE PROPOSED REVENUE PROCEDURE IS UNAUTHORIZED BY ANY ACT OF CONGRESS

A Revenue Procedure is intended as law for a nation of 220 million people. All would agree that the proposal before your Subcommittee today is one of extreme importance. The IRS claims it is that. Certainly it pertains to such weighty matters as racial discrimination, the ongoing life of churches, liberties of parents, revenues for our Government, tax liabilities of citizens, and the operating of thousands of schools. It would be astonishing to imagine that any such measure would be put forward unless it were clearly authorized by the Congress. It would be more astonishing if the proposal were founded on a flotsam of inferences from Supreme Court decisions, predictions as to how the Court will "surely" act, IRS's own precedents, official gossip about the fundamentalist schools, and the subjective social views of brother citizens who happen to be public servants. Yet that, unhappily, is the case.

Chief among the reasons advanced in support of the IRS assertion that it possesses the necessary authority to adopt the Procedure is the claim that the affirmance, by the United States Supreme Court, of the decision of the Federal District Court for the District of Columbia in the case of *Green* v. *Connally*, acts as an unassailable stamp of approval upon IRS's present interpretation of Section 501. Yet the Supreme Court, in 1974, noted that IRS had reversed its position during the course of the *Green* litigation, and because of that reversal, its affirmance in *Green* lacked "the precedential weight of a case involving a truly adversary controversy". 416 U.S. 725, 740 (fn. 11) (1974). The Court flatly stated that "The question of whether a segregative private school qualifies under 501(c)(3) has not received plenary review in this Court". Ibid.

IRS has misread the plain language of Section 501(c)(3) in urging that all religious organizations also exhibit all of the elements of a common law charitable organization, including conformity to the "public policy" of the day, in order to be considered exempt under that Section. Section 501(c)(3) exempts organizations organized for religious or charitable purposes, not organizations organized for religious and charitable purposes. There is thus no basis whatever, in the language of the Section, for importing the common law of charities into the Section's requirements. Yet this IRS has admittedly done.

II. UNCONSTITUTIONALITY OF THE PROVISIONS OF THE REVENUE PROCEDURE

Apart from the threshold problem of lack of statutory authority for the Proposed Revenue Procedure, is a series of features of the proposal which render it inescapably unconstitutional.

Many—perhaps most—religious schools are not part of any "system" of "commonly supervised" schools. They exist instead as integral parts of the religious teaching mission of independent churches. Yet IRS, in its proposal, accords a degree of latitude to those church-schools which are part of a "system" which it does not similarly accord to independent church schools. The question is thus presented: May the religious liberty of any church be made to depend upon its being part of a "system"? It is plain, however, that government may not condition religious liberty upon conformance to a scheme of ecclesiastical organization favored by government.

IRS, to unconstitutional effect, persists in its failure to recognize that church-schools exhibit few, if any, of the characteristics of the public schools. For instance, a church-school does not "draw" (as, in a critical passage, IRS assumes) its students from public school grades. A church-school has no power of assignment of students. Rather, it is parents who enroll children in church-schools, and IRS has not the slightest power to regulate parents in choosing the schools in which their own children shall enroll. This the parents do, typically, for a variety of reasons, though invariably for the positive reason of desiring the child to become fully a Christian, and to benefit from the hard work, discipline and religious formation which the church-school fosters. Should, incidentally, IRS attempt to sift parental motives so as to distinguish religious from secular motivations, it would thereby violate the Establishment Clause of the First Amendment.

Too, IRS continues to fashion its own home-made concept of the "community" served by a church-school. Church-schools—be they Amish, or Fundamentalist Christian, or whatever—serve their own faith communities, and not any given geographical region, as IRS supposes.

The error in this designation of "community" by IRS becomes the cause of burden upon the religious liberties of these church-school faith communities when IRS attempts to force them to be related to enrollment patterns in public school districts in order to avoid the opprobrium of being designated a body which is presumptively racially discriminatory, i.e., a "reviewable school".

But should a church-school lie in an IRS target area, and should it not meet IRS minority enrollment standards, it is prima facie discriminatory and thus, in most instances, threatened with economic extinction. To escape this fate, a church-school must demonstrate its willingness to entirely subserve its religious requirements as to enrollment, evangelization, use of religious trust funds, teacher qualifications, curriculum, and overall direction to the secular requirements of IRS in those critical areas of the church's religious mission. This would be violative of religious liberty—and thereby unconstitutional—were the IRS standards fixed and readily knowable by the church, but alas, they are not. Instead, IRS holds itself to no standard but its own judgment of what constitutes "all the applicable facts and circumstances" involved. IRS has listed some, but not all, of those facts, and has left itself a free hand in weighing whatever facts and circumstances it determines are "applicable" in any given situation. This in itself, violates due process.

CONCLUSION

A loss of exemption from income taxation is a serious burden to a church-school. Avoidance of that loss may not be made to depend upon conformity by a church to a favored government policy, or upon abandonment of a constitutional right, without a clearly expressed Congressional mandate which itself represents the least restrictive means of achievement of, not just a legitimate government interest, but of a "compelling state interest", *Sherbert* v. *Verner* 374 U.S. 398 (1963). The IRS proposal is neither clearly mandated by statute, nor preservative of rights of religious minorities.

If, based solely upon IRS administrators' interpretations of Supreme Court decisions, IRS may fasten this Proposed Revenue Procedure on religious schools, there is plainly no reason why, in succeeding years, the administrative imagination should not produce further and worse intrusions upon those schools. The words of Madison, in his great Memorial and Remonstrance, are here apt:

". . . [I]t is proper to take alarm at the first experiment with our liberties. . . . The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedent. They saw all the consequences in *the principle*, and they avoided the consequences by denying the principle." James Madison, A Memorial and Remonstrance, II Madison 183–191. (Emphasis supplied.)

STATEMENT OF LIPMAN REDMAN, WASHINGTON, D.C., ACCOMPANIED BY MICHAEL I. SANDERS, WASHINGTON, D.C.

When the Commissioner of Internal Revenue issued his original proposed revenue procedure on August 21, 1978, Mr. Sanders and I participated in the preparation of a statement submitted to the Commissioner. Our statement had as its most fundamental point that the Commissioner clearly had the right, and indeed the duty, to take appropriate steps to insure that private schools which practice racial discrimination in violation of the law do not enjoy tax exempt status. We continue to subscribe to that principle. We start with what appears to be axiomatic: The Internal Revenue Code has provided for many years for certain tax benefits for those organizations which satisfy the congressional standards set out in the Code. Throughout that period the Code has imposed upon the Commissioner of Internal Revenue the obligation to enforce those provisions, just as he has the obligation to enforce all other Code provisions.

Section 501(c)(3) is of course the charitable organization provision which defines those organizations which are exempt from tax on their income; deductibility of contributions to such organizations is determined under Section 170(c)(2). There is nothing new about the Commissioner's obligation to monitor the activities of all (c)(3) organizations to determine their qualification for receipt and retention of the relevant tax benefits. Nor is there anything new about the Commissioner's frequent activity in this general area and more particularly with regard to tax exempt schools.

In terms of recent years, the Commissioner's effort took the form of IRS News Releases of July 10 and 19, 1970, which were followed by Revenue Rulings 71-447 and 72-54. The purpose of all of these pronouncements was to articulate the basic requirement that tax exemption required private schools to operate in all respects in a manner which did not discriminate on the basis of race, color, or other elements of ethic origin.

These rulings were issued in the context of judicially ordered efforts to desegregate public schools throughout the country and the related attempt to satisfy the educational requirements of some segments of the population by the establishment of private schools. It was in that context that various court decisions confirmed the long-standing principle that an organization which operates illegally or in a manner contrary to public policy is not "charitable" and therefore not entitled to benefits of Federal income tax exemption. *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303 (1877); *Girard Trust Co.*, v. *Commissioner*, 122 F. 2d 108 (3rd Cir. 1941). In view of the well-defined public policy against racial discrimination reflected in the Civil Rights Act of 1964 and cases such as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), courts have applied the above-described principle over the past several years to deny tax exemption to private schools which practice racial discrimination. *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), aff'd per curiam sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971). It is thus clear to us that the Internal Revenue Service has a legal duty to deny the benefits of Federal income tax exemption to private schools which practice racial discrimination.

There are some who dispute this on the basis of the footnote in the Supreme Court's 1974 decision in *Bob Jones University* v. *Simon*, 416 U.S. 725, where the Court noted that the *Green* v. *Connally* decision "lacks the precedential weight of a case involving a truly adversary controversy." Although that comment was truly dictum to the issue before the Court, considerable stress is placed on the footnote by those who contend that the Supreme Court has not "really" decided the basic question.

We suggest several clear and fully dispositive answers.

1. It appears that there has been only one Federal Court decision[1] subsequent to *Green* v. *Connally* which dealt squarely with the precise question with which we are concerned today: is a private school which engages in racial discrimination entitled to tax exemption under Section 501(c)(3)? In that decision (*Goldsboro Christian School* v. *United States*, 436 F. Supp. 1314 (E.D.N.C. 1977)) the Court held specifically that the answer is in the negative:

"Since benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy. It cannot be assumed that Congress intended to confer this encouragement, however indirect, to organizations which actively violate declared national policy. While there is no specific language in the statute to the effect that an organization satisfying one or more of these qualifying purposes is excluded because its practices violate public policy, this limitation has been held to be inherent in and compelled by both common rules of statutory construction and congressional intent."

The second answer to those who rely on the 1974 footnote dictum is provided by Congress itself. This appears in connection with Public Law 94-568 enacted October 29, 1976, to add Section 501(i) to the Code, denying tax exemption under Code Section 501(c)(7) to social clubs which practice racial discrimination. In making that change, the Finance Committee (Senate Report No. 94-1318, 1976-2 C.B. 601) made clear the congressional intention to overrule the Federal District Court decision in *McGlotten* v. *Connally*, 338F Supp. 448 (D.D.C. 1972). In explaining that purpose the Committee report makes equally clear the congressional intent to treat the Supreme Court decision in *Green* v. *Connally* as the law applicable to private schools, i.e. that tax exemption is not available to such schools which practice racial discrimination. The Committee report goes on to say that the purpose of the new provision regarding social clubs was to bring them into line with "national policy" against racial discrimination.

To make the same point in a different way: since Congress understood *Green* v. *Connally* to establish the rule that private schools which practice racial discrimination are not entitled to tax exemption, there is no need to say so in the Code, but since the *McGlotten* decision announced the opposite rule as to social clubs, an amendment to the Code was the only means available to the Congress to impose the same condition upon social clubs as *Green* v. *Connally* imposed upon private schools, namely that tax exemption required compliance with the strong national policy against racial discrimination.

The Commissioner has now made the determination that experience under the existing pronouncements proves their inadequacy. I have no way of evaluating that experience and the related determination, but given the Commissioner's threshold determination, it is his prerogative—and indeed, his obligation—to adopt such measures as in his judgment are deemed necessary or desirable to insure that schools which discriminate do not enjoy tax-exempt status.

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[1] Advocates of the proposition that the Commissioner does not have the power to act cite the post *Green* v. *Connally* decision by Federal District Court after remand from the Supreme Court in the Bob Jones University case. But that case (No. 76-775 (D.S.C. filed December 26, 1978)) did not involve the question with which we are concerned, and indeed specifically distinguished (and in effect approved) the *Goldsboro* decision. Thus: "The secular interest being advanced in *Goldsboro* could be considered compelling, for that interest concerned granting blacks equal access to educational institutions, an interest which this Court earlier recognized was in keeping with clearly declared public policy. On the other hand, this Court can discern no public policy of comparable magnitude with respect to the prohibition of discrimination by private institutions on the basis of the race of one's spouse or companion. Thus, revocation of the plaintiff's tax exempt status after May 29, 1975, constitutes an unconstitutional infringement of plaintiff's right to the free exercise of its religious beliefs."

The proposal creates two categories of schools whose tax exempt status is conditioned upon their showing the absence of the prohibited discriminatory policy by satisfying one of two sets of standards. The Revenue Procedure states that experience indicates the need for that special burden in the case of adjudicated schools. Assuming the absence of any evidence that the school has dropped its discriminatory practices, we have no problem with that determination.

The justification for the same rule as to reviewable schools is stated to be the "badge of doubt" standard enunciated in *Green* v. *Connally*. This appears to be a justifiable exercise in judgment on the part of the Commissioner.

Since we do not purport to be expert in the area of civil rights, we are not in a position to evaluate the Commissioner's judgment in proposing specific criteria for determining the presence or absence of a non-discriminatory policy. We suggested, however, as to the Commissioner's original proposal, that the question did not appear to lend itself to precise categorization, that failure to meet specified standards should therefore not mean automatic loss of tax exemption by reviewable schools as originally defined, and that instead each such school should have the opportunity to show its non-discriminatory policy by its own facts and circumstances, that separate rules were appropriate for specialized schools, and that except for those reviewable schools which were not making a good faith effort to comply with the proposed guidelines, there should be no announcement of suspension of advance assurance of deductibility.

We are pleased to say that the Commissioner has seen fit to adopt, to varying extents, at least the primary thrust of each of those suggestions. Accordingly, subject again to our disclaimer regarding specific guidelines, we endorse the substance of the current proposal.

1. A pervasive theme of the current proposal is an emphasis on facts and circumstances, as opposed to specific standards which require compliance. This emphasis is apparent in two key respects, first with regard to the definition of a reviewable school (Section 3.03), and second in formulating the guidelines for determining whether a reviewable school engages in discrimination (Section 4.02).

2. In the former respect the proposal relies upon facts and circumstances in connection with applying two of the three elements of the definition of a reviewable school. As to the guidelines, the proposal states the rule in very simple terms: a reviewable school need only "show that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis". The proposal then goes on to give examples.

We believe that this is a realistic and practical approach to the problem: the Commissioner has provided helpful guidelines to the schools and to revenue agents. These guidelines appear to be reasonable and workable.

3. At the same time the proposal makes several other noteworthy procedural changes. These include the elimination of (a) the originally proposed two-year grace period and (b) a special rule for the application of Revenue Procedure 72-39 (announcement of withdrawal of assurance of deductibility prior to final determination of revocation). We believe these two changes to be sound: the new facts and circumstances tests appear sufficiently flexible to warrant reliance upon the normal rules for audit and deductibility.

4. It is equally noteworthy that the Commissioner proposes to coordinate at the National Office the review of certain actions in the field. This too appears to be a sound approach, at least during a transition period following the adoption of a final rule.

As noted at the outset, we believe that the current proposal represents a significant improvement over the original suggestion, and in substance, we support the current proposal.

Senator **Packwood**. Next, we will take Mr. Kelly and Mr. Weniger.

STATEMENT OF WILLIAM KELLY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

Mr. **Kelly**. My name is William Kelly, superintendent of Christian Unified Schools in San Diego. I represent the Association of Christian Schools International. Our offices are in Whittier, Calif.

We represent some 1,000 schools around the country with approximately 180,000 students.

The average school size is 218 students.

We have been operating for well over 15 years now. We do not allow any school with our constituency to discriminate. We have an open admissions policy. This is carried out, in fact.

Some of our schools are highly integrated; others are not. Geographic differences, makeup of the community, a number of factors would go into creating a situation in which a number of our schools—as a matter of fact, hundreds of our schools would fall through the cracks in these proposals.

The sole purpose of our schools is to integrate a deep conviction about Jesus Christ into every segment of our curriculum. We do not apologize for that; we are fundamentally religious. The whole purpose of our ministry, the whole focus of our commitment, is religious.

We do not exist for secondary educational purposes.

Interestingly enough, the largest professional group representing our schools represents children from public schools, administrators, teachers, families; 80 percent of our schools are operated by churches; 20 percent on an independent basis. Even though they are operated by independent boards, they are deeply and fundamentally committed to the church.

We feel that our schools are as much a part of the local church as its choir or any other facet of the church's ministry.

Our young people are taught to obey the authority over them and to have a high regard for discipline and self-esteem. We do believe that there is a fundamental difference between public schools and tax-exempt Christian schools. We do not have an issue with IRS and their imposition of these guidelines on nonreligious schools. However, we do take issue with its action against religious schools because of the interference in the church-state separation.

Because we are an integral part of the Church, IRS puts itself into a position of being just one step short of racially integrating the congregation of our churches. We feel that schools are the biggest and, as such, such an entanglement should be avoided.

We also feel that it would be better that IRS should establish procedures in dealing with these schools that are found to be in violation of the law, rather than attempting to define the law.

As far as I am concerned, from the testimony today, that there are only 20 schools in the country that have been found to be in violation of the law. We take no issue with IRS in its attempt to remove the tax-exempt status of those schools. We do feel that it is fundamental in the language of section 301.5, definition of minority. IRS defines, or outlines, that a minority must be composed of minority students or minority groups within that particular community that are apt to be discriminated against.

In the community that I represent, there are Hispanics and blacks. We can go very easily and conveniently into the black community with our program, because the black community is predominantly Protestant. When we go to the Hispanic community, we are forced into a situation where we actually begin to proselytize our Catholic brothers.

What IRS is really doing in effect, the bottom line, is we are going to be picking and choosing out of our Catholic churches in our communities. That is not going to sit too well with our Catholic brethren.

Commonsense should prevail in this situation. We feel that once a school has slipped into this category, their donor base will begin to be eroded. People would naturally suspect that their gift would be subject to challenge.

We are on a thin line between austerity and disaster. When you start tampering with our tax exemption, you are tampering with our very livelihood.

Over 90 percent of our schools are all independent. These schools cannot afford to hire accountants, attorneys, and professional staff to prove themselves otherwise.

Thank you.

Senator PACKWOOD. On the right of exemption—not church exemption, but tax deduction for a contribution to a church, the concept that the two are a part of a church and you cannot separate one from the other. You say:

> The Internal Revenue Service has a right to impose a racial quota system on a Christian school, Catholic or Hebrew school only to the extent that the IRS has a right to racially balance the congregation of a church or synagogue.

Are you saying that the IRS or the Congress would have no right to remove the deductibility of contributions to a church if the church consciously practiced racial discrimination?

Mr. KELLY. Not being a constitutional attorney, I respond to that with personal conviction. I do not think that it would have that right.

Many of these schools are governed by common boards. The board of deacons may very well be the school board, so it is difficult to split the two apart. It is very difficult.

Senator PACKWOOD. That is the largest issue. It came to light in the House of Representatives hearing in February. I believe Commissioner Kurtz's response to that issue was that, in his opinion, IRS has the right to remove the tax-exempt status of a school, or of a church, whose practices are discriminatory.

I do not want to get mixed up on whether or not Congress has given the IRS the power.

Let me back up.

Frequently, when we have had tax reform hearings before this committee, tax reformers come forth saying no deductions for charity, no deductions for churches, $10,000 of income pays a 10-percent tax of $1,000; simple in their estimation.

If we accept that, obviously we are taking away the deduction for church contributions. I do not think anybody really questions the right of Congress to do that. Indeed, if we want to go to an income tax which does not allow any deduction, we have the legal power to do it.

Do we have the legal power to say we are simply going to permit charitable deductions?

We may not exercise it, but we probably do.

Do we have the right to prohibit charitable deductions to any group that may practice, or does practice, racial discrimination? The answer is no, we do not have that right and that power, Mr. **Kelly**. That is correct. I do not know how you split the hair in such a fashion. Although it is totally repugnant to us to allow a school to be perpetuating racial discrimination.

Senator **Packwood**. If you say that we do not have the right to do it, but I understand the courts to say that we do have the right, and the power to do it. I agree with you that most of the schools do not discriminate, but if we do not have the right to do it, how do we put into law or into regulations that fine line, of those schools that do discriminate, without undoing and impeding the operations of the rest?

Mr. **Kelly**. I have no specific answer for it. For example, in our local school situation, if we were to be guilty of discriminating against anyone, then I would feel perfectly at ease being taken into court and proving our innocence in court. The problem is with the regulations the way they are now, we have to prove our innocence. We have to go to court, in effect, without a complaint just because of the interpretation of a particular revenue agent.

That is something that we cannot control. He may feel that this particular law or regulation casts doubt upon our program. Therefore, in order to carry out his mandate, he must put us in this category of suspicion.

The American Civil Liberties Union and other organizations, I think, are still quite capable of providing financial support to parents who feel, in fact, that they are discriminated against in any one of our schools.

That has never been the case with any of the schools in my community, and I do not think that it would be. That is not a definitive answer, but it does lay the burden of proof upon the apparatus that is set up for that, rather than leaving it in the hands of the bureaucracy.

Senator **Packwood**. Thank you very much.

Dr. **Weninger**?

STATEMENT OF ARNO Q. WENIGER, JR., EXECUTIVE VICE PRESIDENT, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS

Mr. **Weniger**. Thank you, Senator Packwood. I am Arno Q. Weniger, Jr., and I speak as vice president of the American Association of Christian Schools, which is comprised of almost 850 member schools across the country enrolling over 135,000 students. Our schools are located in 44 of our 50 States, and we have affiliated State chapters in 33 of these States.

If present trends continue, the American Association of Christian Schools will have over 1,000 schools next year with an enrollment of over 175,000 students.

Senator **Packwood**. For the record, what is the difference between your association and that of Mr. Kelly's?

Mr. **Weniger**. Basically we got started on the east coast and are moving west and they got started on the west coast and are moving east.

I have with us our tax counsel, William J. Lehrfeld who, for 6 years, worked for the Internal Revenue Service.

The American Association of Christian Schools is comprised of Christian schools, the great majority of which, perhaps 95 percent, are affiliated, controlled, and directed by individual local churches.

These schools are ministries of the local churches and are likewise administered by the deacons and pastors of the churches. Our schools are independent and autonomous. They seek fellowship with the American Association of Christian Schools which provides services and information along with the promoting of Christian education across America. Our association has no authority over any of our schools and therefore we are unable to speak directly for our schools. It must also be understood that these schools can only be looked at in the light of their relationship to the church. Almost without exception, the pastor of the church is the superintendent of the school.

Oftentimes he teaches a class or two, preaches in the chapel, and gives direction to the staff of the school. Deacon boards are school boards and business on behalf of the school is conducted along with the other business of the church. These schools are without a doubt as religious and spiritual as any function of the church.

I have spoken in many of these schools, their State association meetings, and as well their regional conventions from Fairbanks, Alaska to Miami, Fla., from the tip of Maine to the shores of northern California. I do not know of any school in our association who excludes any racial group. In fact, our schools are mixed with children of all races.

Admission to these church schools is based upon spiritual standards rather than ethnic background. Children must be willing to accept not only the spiritual and moral standards of the schools but their parents must, as well, agree to its importance in order to maintain enrollment in these church schools.

The parents of students enrolled in these Christian schools are not only paying taxes in support of the public school system but they are likewise paying tuition of considerable amount in order to see to it that their children are educated academically, morally, and spiritually. Our parents will continue to be willing to make a sacrifice for the sake of their children. Our schools do not accept government aid, refuse the title programs of the public school system, and wish to continue to be totally free and independent of bureaucratic control and funding.

Let me now speak concerning our opposition to the revised revenue procedure released February 9, 1979. This opposition was delineated by letter to the Internal Revenue Service, voiced at their hearings in December, reaffirmed in testimony before the House Ways and Means Subcommittee on Oversight on February 21, 1979, and is once again given before this committee.

It is our firm belief that the Internal Revenue Service has no constitutional authority for these revenue procedures. The application of these procedures to church-related and church-operated schools is an abridgment of the first amendment of the United States Constitution. In the light of the recent Supreme Court decision in *NLRB* v. *Catholic Bishop of Chicago*, it is apparent that it is the right of church-related institutions to manage their own affairs. "The values enshrined in the First Amendment plainly rank high in the scale of our national values."

It is also our feeling that the IRS has no statutory authority to impose this revenue procedure upon our church schools. In the words of William J. Lehrfeld, our legal counsel:

The Internal Revenue Service has no statutory authority to impose certain filing, recordkeeping notice procedures on churches which, as part of their ministry, happen to conduct an elementary or secondary school for the benefit of the children of its congregation or others.

Our schools are ministries of our churches and for the Internal Revenue Service to invoke these procedures upon our ministry, namely, our Christian school which meets Monday through Friday, leads us to believe that the Government could also impose these sorts of restrictions upon our other ministries. If our day schools must meet a certain racial mix, why not our Sunday nursery, or our bus ministry, et cetera.

To deny tax exemption based upon the criteria of this revenue procedure would be to deny tax exemption to our churches. Our churches do not hold tax-exempt status by virtue of governmental action, but hold that exempt status by its very nature. The Internal Revenue Service only recognizes that exempt status with the issuance of a letter of exemption. To deny that exemption based upon failure to meet this revenue procedure is a veiled threat to the church and is without a doubt an infringement on the free exercise of our religion.

If this revenue procedure were to continue to stand, it would be the beginning of a great profusion of governmental entanglement with religion. Not only would the Internal Revenue Service no doubt have reason to proliferate this entanglement but as well other governmental agencies would do likewise.

This revised revenue procedure has made an accommodation to certain classes of religious organizations and denied that exemption to others. Section 3.03(b) and 3.03(c)(6) exempt in essence Hebrew day schools, Moslem schools, and as well the Amish. Section 3.03(b) also makes accommodation for "a particular school which is part of a system of commonly supervised schools." With very few exceptions, only the Roman Catholic Church operates a system of schools. The revenue procedure clearly gives special status to these schools over other schools. It seems that it is the IRS feeling that those church schools which are of a longstanding practice of religion or which are part of a religious denomination are the only ones that deserve any first amendment protection because of special religious circumstances influencing student enrollment composition.

Our schools are predominantly independent of any denomination and the vast majority are operated as an inseparable ministry of the local church. Our schools are thoroughly religious. Every subject is based upon the Bible, and the student is taught that all truth comes from God. Many of our church schools are new and have recently been founded. The IRS is clearly guilty of discrimination against our independent church schools with the implementation of this revised revenue procedure.

We are in opposition to this revenue procedure because of its subjective nature and the great amount of authority and latitude given to the Internal Revenue Service. It is clear to us, and we would hope as well to the Government, that the Internal Revenue Service is hereby attempting to regulate bonafide churches and their ministries which they have established as an integral part of their religious purpose.

In as much as the Supreme Court determined in *Regents of University of California* v. *Bakke* that the racial quota system in a State-operated school was unconstitutional based upon the 5th and 14th amendments, it would seem even more unconstitutional in a church school in the light of the first amendment. How the Internal Revenue Service, the courts, or this Senate subcommittee can come to any other conclusion is beyond my comprehension.

In the light of our testimony of objection, may I state that we are not here today to quibble about inserting certain language into these proposals to make them more palatable to the Christian Schools of America. My forefathers, Baptists in Virginia, languished in jail until the establishment of that first amendment which reads, "Congress shall make no law respecting the establishment of religion or prohibiting the exercise thereof."

I respectfully urge this committee, and as well both Houses of Congress, to restrict the Internal Revenue Service from implementing these revenue procedures, particularly as they affect the Christian church-schools of our Nation, in the face of our Constitution and the first amendment.

Senator PACKWOOD. I fear you are inviting a problem for yourself when you say that they have no statutory authority, if indeed that is the case. Congress says that proper religious schools shall not discriminate and that we will give them statutory authority. Then you will have lost that upon which you base your argument.

Mr. LEHRFELD. That is quite true. We do not think that the Congress is inhospitable to churches.

Senator PACKWOOD. Not inhospitable to churches, but definitely inhospitable to racial segregation. Those are two constitutional problems coming together. I do not know how to predict the religious argument in terms that you have no right to ask this. Again, I do not like the regulations that I have seen to date. I do like the idea of religious nonpublic schools existing in this country. I think that they should be encouraged.

Mr. LEHRFELD. Let me pose this question, if you have a taxable church school, is it entitled to the ordinary and necessary business expenses?

Senator PACKWOOD. Taxable, or deductible?

Mr. LEHRFELD. I am talking about the taxability of the school. For example, as the Supreme Court has done, are the legal expenses and bookkeeping expenses deductible or nondeductible because of public policy considerations? The Supreme Court has stated that they are deductible, just as mentioned earlier. They are deductible.

This is a question of public policy directly affecting deductions. It is amorphous, to say the least, because I see no difference, as a tax lawyer, between an exemption, whether it is a personal exemption, or a corporate exemption. So that, if you deny the exemption, you may be likewise, at least logically, called upon to deny the deduction for the net expenses incurred by the school in running the school program.

If you give a deduction to the bookie for his net expenses in running his illegal activity, why would you not simply extend it to the taxable school? If you can extend the deduction, why are you not simply able to extend the exemption?

I, frankly, I have not seen anybody address this.

Senator **Packwood**. I think that Congress may have the power to do so, and I think that we are better off arguing in the realm of policy rather than in the realm of constitutionality. This makes it clear that Congress should take action.

Thank you very much.

Mr. Dugan?

STATEMENT OF ROBERT P. DUGAN, JR., DIRECTOR, OFFICE OF PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS

Mr. **Dugan**. We are grateful to you, Mr. Chairman, and to your committee for holding hearings on the IRS revised revenue procedure for private tax-exempt schools, released February 9, 1979. We believe that the U.S. Senate and the House of Representatives are the proper places for determining law; not the offices of the IRS.

My name is Robert Dugan. I speak on behalf of the National Association of Evangelicals with its 36,000 churches, as well as the several hundred member schools of our National Association of Christian Schools. Beyond that, on this issue I believe that we sense the mind of the 45 to 50 million evangelicals in the Nation. Let me now speak to two bills under consideration.

S. 103. To Provide the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies.

Agreement with IRS objectives. We deeply believe in the elimination of racial discrimination in our Nation. NAE and NACS have consistently maintained a policy in all our schools of nondiscrimination on the basis of race, color or ethnic origin.

That some private schools, purporting to be Christian, have been formed with discriminatory intent, is a matter of embarrassment to me. However, the most important reasons why parents have chosen to pay twice to educate their children are these: to provide a higher quality of education, a firmer disciplinary framework, and specific moral and religious instruction, resulting in a Christian world-and-life view.

Disagreement with IRS method. Regarding the proposed IRS procedure, it is not its stated objective, but its method, to which we object. Let me early compliment IRS for listening to the public in extensive hearings. Modifications have been made to its original proposal which would make it easier for schools to show that they are not discriminatory in admission policies. While we are grateful for small favors, the overall approach of this regulation is objectionable.

(a) The principal flaw is in the principle of the thing. It is our conviction that no school should have its tax-exempt status revoked unless it is adjudicated discriminatory on a case-by-case basis. IRS has not modified its approach of assuming that schools are guilty of discrimination, according to certain statistical guidelines, until they prove themselves innocent. We believe that the burden of proof should rest on the IRS to show discrimination based upon accusations and legal decisions.

The U.S. Supreme Court supported this conviction on November 13, 1978. Reversing a lower court decision which required New Hampshire's Keen State College "to prove the absence of discriminatory motive" in denying full professorship to a woman, the Court indicated that the burden should be upon the prosecution to prove guilt, rather than upon the defendant to prove innocence. Our criminal system does not require someone suspected of murder to prove the absence of a motive, but rather expects the accuser to find evidence of motivation beyond a reasonable doubt. Should not private educational institutions be treated at least that well?

(b) Some practical flaws: In section 3.03(c), "Facts" 8, 9, and 10 have no bearing on creating suspicion of maintaining racial discrimination. Since most parents have academic, disciplinary, moral and spiritual reasons for sending their children to private schools, it is only natural that most students will come from public schools. It is there that the shortcomings are felt.

In exempting certain religious groups with longstanding practice which itself is not racially discriminatory, IRS appears to be discriminating in order to destroy discrimination. This criterion, section 3.03(c)(6), would leave under suspicion new denominations which have not had time to develop a historical record on nondiscrimination; independent Christian schools which are parent-controlled, rather than parocial, with no historical entity behind them; and individual churches of denominations with congregational autonomy, where the historical practice and convictions of one local church may be quite different from those of another in the same denomination.

The criteria by which a reviewable school can show that it has undertaken actions designed to attract minorities may at best be difficult to fulfill and at worst illegal. I refer to section 4.03, 1–5. Insisting on minority recruitment, special programs, scholarships and tuition waivers, forces a religious organization to spend its money in a governmentally enforced manner. Government has no such dictatorial right.

Parents of the religious group itself, unable to secure scholarship aid for their own children, would be forced to produce funds to give scholarships to others. Insisting on recruiting minority teachers puts such schools in a predicament. The midwestern Christian liberal arts college which represents in the evangelical movement what Notre Dame University represents to Roman Catholicism, will graduate exactly one minority student with an education major this June.

Participating in sports and other collegiate activities with integrated schools will be beyond the financial capability of interscholastic competition, strictly for budgetary reasons. Finally, to insist that a school have minority board members could only presume that there are minority persons in the particular community of faith sponsoring a given school. Keep in mind that religious criteria are the sine qua non of qualification for board membership or faculty, in evangelical schools.

(c) The ultimate flaw: What a supreme irony it is that the well-intended effort of IRS would not just put a crack in the wall of separation between church and state, but it would smash a hole in the wall wide enough to drive the proverbial Mack truck through. If Government persists in forcing private religious schools to recruit minority students, Government will have become responsible for the evangelization and conversion of thousands of minority children. While some might smile at this strange twist and even thank God for it, those of us who are committed to the separation of church and state choke at the prospect of Government's causing children to become converts of any faith or denomination. Evangelism must be a totally free and voluntary activity.

In the *Schempp* case, the U.S. Supreme Court indicated that to withstand the strictures of the establishment clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The IRS approach, by unwittingly advancing religion, would fly directly in the face of that decision.

Passage of S. 103 would require that additional legislation be developed prior to the end of 1980, in order to remedy the flaws of the proposed IRS regulation. Delay would be better than enforcement of the dubious regulation, but NAE prefers and recommends that the Finance Committee develop legislation that would allow the removal of tax-exempt status from schools only after they are adjudicated discriminatory by due process, and that the legislation would eliminate the category of reviewable schools from the IRS regulation.

We thus support S. 995, introduced recently by Senator Jesse Helms, which would require the Secretary of the Treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to a private school on the grounds of racial discrimination.

S. 449, to amend the Internal Revenue Code of 1954 to provide that the tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be construed as the provisions of Federal assistance.

There is an urgent need for Congress clearly to stipulate its intent concerning tax exemption. The IRS attitude that we grant tax-exemption really should reflect a different spirit, namely, that we recognize certain organizations, by their very nature, as tax exempt.

Implicit in the thinking of many Government officials, is the concept that nontaxation is somehow abnormal. The assumption that Government has a right to tax everything, whether animal, vegetable or mineral, seems totalitarian and therefore repugnant. The National Association of Evangelicals strongly support S. 449, in order that tax exemption will once and for all be distinguished from Federal subsidy. We believe that voluntary, nonprofit, charitable and religious organizations and institutions, should have tax-exempt status that is not considered Federal support for the following reasons:

(A) Such groups should be free to accomplish altruistic objectives without governmental interference. (B) Their pluralistic benefits enhance national life. (C) Their inherent nontaxability is evident. (D) A Constitutional illegality exists otherwise.

A. ALTRUISTIC OBJECTIVES

European visitor Alexis de Tocqueville noted a unique quality in colonial America. He marvelled that, when needs developed in communities, the people voluntarily associated themselves together and organized to meet those needs. The opportunity for individuals voluntarily to participate in elemosynary organizations is one of the blessings of a free society. Such organizations accomplish altruistic objectives which neither government nor business is attaining, or perhaps could attain.

B. PLURALISTIC BENEFITS

There should be no need to argue the point that churches, charitable organizations, voluntary groups, and other nonprofit institutions have a vital role in enhancing pluralism in our Nation. Supreme Court Justice Brennan articulated this viewpoint in his concurring opinion in the *Walz* decision:

> Government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, non-profit groups which receive tax exemption, for each group contributes to the diversity of assocaition, viewpoint, and enterprise essential to a vigorous, pluralistic society.

C. INHERENT NONTAXABILITY

Yale Law School Professor Boris Bittker points out that the very nature of charitable and nonprofit organizations makes them nontaxable. Congress recognized this fact in the first modern revenue act of 1913. Professor Bittker states:

> Neither the net income concept nor the ability to pay rationale for income taxation can be satisfactorily applied to charitable organizations. The exemption of these organizations from income tax is not a preference or a special favor, requiring affirmative justification, but an organic acknowledgement of the appropriate boundaries of the income tax itself.
>
> If non-profit organizations do not have income in the ordinary sense, as we have argued, their exemption from income taxation is not properly classified as government aid, raising an establishment clause problem. It is rather, a normal or even inevitable corollary of the economic and philosophical foundation on which the income tax law rests.

In more specific reference to religious nonprofit churches and organizations, the freedoms secured by the religious clauses of the first amendment have been elevated above the other freedoms enunciated in that amendment. We shall not take time to develop this contention in our testimony.

Throughout the history of our Nation, however, the Bill of Rights has enjoyed a position of special importance. In *West Virginia* v. *Barnett*, the U.S. Supreme Court said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty and prosperity, to freedom of speech, to freedom of the press, to freedom of worship, and assembly and other fundamental rights, may not be submitted to vote. They depend on the outcome of no election.

D. CONSTITUTIONAL ILLEGALITY

In the landmark *Everson* case in 1947, the Court stated that—

> neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, or whatever form they may adopt to preach or practice religion.

In the light of this ruling and many others since that time, it is patently clear that if we construe tax exemption as Federal assistance, then our several decades of tax exemption for nonprofit, religious organizations have constituted a blatant violation of the establishment clause of the first amendment. Certainly that has not been the case.

CONCLUSION

The passage of S. 449 would clarify ambiguities that have existed in the minds of many Government officials, concerning the meaning of tax-exempt status for certain organizations in relationship to the Federal Government. S. 449 would erect a fence around charitable, nonprofit organizations, and have the effect of posting "Keep Out" signs where all governmental intruders could see them.

Thank you, Mr. Chairman.

Senator **Packwood**. Thank you. The next witness will be Rev. L. Samuel Martz, on behalf of the Independent Fundamental Churches of America.

Mr. Martz?

STATEMENT OF REV. L. SAMUEL MARTZ ON BEHALF OF INDEPENDENT FUNDAMENTAL CHURCHES OF AMERICA

Reverend **Martz**. I am Reverend L. Samuel Martz, speaking on behalf of the Independent Fundamental Churches of America. I would like to speak in opposition to the IRS revised guidelines on tax-exempt status of private schools and offer my support to Senate bills 103 and 449. The IFCA passed a resolution in 1978 opposing encroachment and unnecessary control by Government over the ministry of Christian schools. I feel that the IRS was insensitive to many of us who testified at the December hearings, because the new guidelines have not changed very much from the original revenue procedure. Also, I think there are contradictions and inconsistencies in the IRS revised proposal.

I see a great difference between nondiscrimination and racial balance. I think they have lumped these together.

The principle of precedence is very strong in government. There is no precedence anywhere for the "reviewable" school issue. That is why I feel that this bill should be passed by the Senate.

We are opening the door for church and state separation issues. The Christian school is a vital part of the ministry of the church. This issue will not be settled in this room today. This is getting into a new issue which I think will get us into a lot of difficulty. Most parents send their children to a Christian school for religious reasons, not for racial reasons.

The public schools in America are very unsettled. The academic scores are going down, while the Christian schools are continuing to give quality education. I think also that the IRS policy violates various private school guidelines, the Amish and various other schools. Therefore, I would encourage support of Senate bill 103. IRS has shown its incompetency at this point and I urge you to support Senate bill 449 concerning tax exemption.

Senator **Packwood**. Thank you.

Reverend Nicholls?

STATEMENT OF REV. JIM NICHOLLS, INTERNATIONAL COUNCIL OF CHRISTIAN CHURCHES

Reverend NICHOLLS. Thank you, Mr. Chairman. I am actually a neighbor of yours. I live across the river from you in the State of Washington. I have a daughter who lives in Eugene. I used to work at a radio station and I watched you when you first ran for the Senate in Portland.

Mr. Chairman, as you perhaps may see from my statement, I am sitting in for Dr. Carl McIntyre who is conducting a Bible seminar in the Holy Land and thus is unable to be here. I have formally supplied to your office copies of Dr. McIntyre's previous testimony and I ask that it be inserted in the record.

I also will not take the time to read my statement, but simply ask that it be inserted into the record. I do have a few comments that I would like to make.

We have, for quite a while, sat here today. One thing that Mr. Kurtz said when he was here, he said that they operate within the Constitution. There are certain people in Congress who feel that the IRS does not operate within the Constitution and I understand that there are bills before the legislature which will allow the Congress to investigate the IRS and see if they are really operating within the Constitution.

You have asked a question here about the constitutionality of certain things. It is my considered opinion that Congress shall make no law respecting the establishment of a religion or preventing the free exercise thereof, and for the IRS to get into here, they have intruded into an area that not even Congress has any right to intrude in. You are seeking for some guidance. You asked some questions previously, very good questions. You are to be complimented for the questions that you ask.

I would ask that you sponsor a bill, or that your committee sponsor a bill, to investigate the constitutionality of this question. It is a very serious question. I will have more to say about that in a moment, regarding the priorities and so on.

I am a Protestant. I have been in Camden, N.J. and was in touch with the head man of the Roman Catholic schools for the State of New Jersey. As we discussed school problems, the preposed rules and regulations of the IRS and Christian schools, et cetera, he said, "We have a real problem here in Camden." I asked him what it was.

He replied that they wanted to show that they did not have any animosities or bias. They wanted to show that they were not against the blacks, or non-Catholics, so they opened up one of their schools and removed all restrictions as to race and religion. He repeated, "We have a terrible problem. We do not know how to deal with it."

I said, "What is the problem?"

He replied, "98 of our enrollment is non-Catholic." I will not get into the racial issue, but there was a large percentage of minorities there, too.

He continued, "For the very survival of the Christian churches with the beliefs that we have, there must be certain controls by the church itself. Now, we experimented, we withdrew controls, and this is what happened." Mr. Chairman, This is something your committee should keep in mind.

The IRS hearings in December, according to Commissioner Kurtz, were the most important that they had ever had, yet on the opening day he got up and walked out of the hearings and drove off to Pennsylvania to give an address in a public library and ignored people who had come all across the country to testify before these most important hearings. I think that that was a terrible affront to those people. I think that is something that should be looked into, when you look into the constitutionality question.

I can supply you more information on that.

Besides attending those hearings, I attended the hearings on the House side. Then these hearings, I have been here all day. Most of my comments in my printed statement are in the form of observation. I think I should give you some observations that I gathered of the December IRS hearings.

I was a newsman for 12 years, was listed in the Working Press of America, so I think that gives me some qualification to make some observations.

Senator PACKWOOD. You will have to draw to a close. I had been giving witnesses a little extra time, but there are more to come and we are trying to hold down the witnesses to 5 minutes.

Reverend NICHOLLS. For many years, we have been hearing about the silent majority. We have wondered why they have been silent, but during those hearings, for the first time, a large segment of the silent majority was heard. I have a list of 251 scheduled witnesses to testify in that oral hearing. What was said, was said many, many times, and I would sum it up this way.

Mr. Chairman, they said we sat back and did little, if anything, about the loss of one freedom after another. They mentioned the fact that in our public schools we can no longer call it a Christmas vacation in America today because the term Christmas is identified with Christ and it would offend somebody and not wanting to offend somebody, they took the risk of offending the whole Christian community, and all we can call it now is winter vacation.

We can no longer call our Easter vacation Easter vacation because Easter is identified with the very heart of Christianity, the death, burial, and resurrection of our Lord, Jesus. It might offend some people. We must not offend anybody. If we are to offend anybody, let us offend the whole Christian community of America and we will do away with Easter vacation. We will just call it spring vacation.

We lost prayer in our school. We lost Bible reading in our schools. We have lost Christian morality in our schools. They went down and named each one, a Christmas pageant, the Christmas carols. There was a pastor from Denver, Colo., who addressed the chairman and the IRS and says we want you to know that we have dug our trenches. We are not losing anything more.

Senator PACKWOOD. Do you believe that the things you mentioned belong in the public schools?

Reverend NICHOLLS. Yes. They are a part of our culture and heritage.

Senator Packwood. Even though they are the obvious preference of the Christian religion?

Reverend Nicholls. Well, you have February for black month. We have special days set aside for special studies. If this is recognized as a thing to do for the blacks, why then, cannot our Christian culture in our schools.

Senator Packwood. You have no objection in the public schools, paid for by everyone, that many non-Christians go with their Christian peers and they use Christian bibles?

Reverend Nicholls. Yes. It is because of this, basically, why we have this revival today of Christian schools in America. This is why we have started our own schools. We did not like the end product. We want our young people to have morals, to be clean and godly in keeping with the Ten Commandments and we are not getting it out of the public schools.

This is the last comment I would like to bring up. A doctor—I forget his name—was one of the last to testify—some 70 people testified on the closing day—and he stood before that panel and told them, now we really are not faced with the decision of what is going to happen in America. You—the IRS panel—are faced with the decision. Dependent on your decision, we may find whether or not we are going to have a religious war in this country. As for me, and I know of many thousands of Bible-believing Christians, we join with Pastor Nelson of Denver. We, too, have dug our trenches. We are not going to give in. What happens in America is your choice. You are either going to continue to serve the God of secular humanism, or the God of the Bible. The choice is yours. What will it be?

Mr. Chairman these observations are something that you, sir, and this committee should realize. There are some very deep feelings.

Senator Packwood. Thank you very much.

STATEMENT OF JAMES E. WOOD, JR., EXECUTIVE DIRECTOR, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

Mr. Wood. I am James E. Wood, Jr., executive director of the Baptist Joint Committee on Public Affairs. I want to thank you, Senator Packwood, and all the other members of the committee who are here today. I also want to reaffirm my appreciation for the hearing itself and for the opportunity to appear before this committee.

The full statement of the Baptist Joint Committee on Public Affairs is, of course, in the hands of the committee, and we would like for that to be part of the record.

The Baptist Joint Committee on Public Affairs is an organization which this year observes its 40th anniversary in the Nation's capital as an agency speaking out on Baptist concerns in public affairs. The Baptist bodies which make up the Baptist Joint Committee have a membership of over 27 million, one-third of whom are black Baptists, historically identified with three black Baptist conventions.

Our agency has a longstanding commitment to the protection of human rights, which is at the very heart of our work, and for the elimination of all forms of discrimination with respect to race, sex, national origin, or religion.

Nevertheless, we have opposed, and remain unalterably opposed to the IRS procedures with respect to the tax-exempt status of church schools, both in their original and their revised forms; and we support the thrust of S. 103 and S. 449. We do so because we maintain that the fundamental issues raised by the IRS ruling—even by the proposed revised revenue procedure which, in some respects, we regard as worse than the original—have to do with the free exercise of religion and the separation of church and state, rather than the furtherance of an altogether meritorious public policy of abolishing racial discrimination.

We supported the Catholic Archdiocese of Chicago in the recent NLRB case, *National Labor Relations Board* v. *The Catholic Bishop of Chicago et al.*——U.S.——(1979), 99 S.Ct. 1313 (1979). We filed an amicus brief on behalf of the Archbishop of Chicago and, indeed, celebrated the decision of the U.S. Supreme Court in maintaining that church schools are outside the jurisdiction of this Government agency.

The Internal Revenue Service, in publishing its revised proposed revenue procedures, has usurped congressional authority. For we maintain, Senator Packwood, that there is a lack of statutory authorization and legal competence on the part of the IRS in its regulation of enrollment policies of church schools.

We suggest that the Internal Revenue Service makes an assumption that church or religious schools were created or expanded on or about the time of court desegregation orders and that they were primarily created for racially discriminatory purposes, when, in fact, these schools were created for a variety of reasons, not the least of which were the historic landmark decisions of the Supreme Court with regard to prayer and Bible readings in the public schools as school-sponsored exercises.

The Baptist Joint Committee has vigorously supported the U.S. Supreme Court decisions of 1962 and 1963, as, indeed, 31 years ago we supported the *McCollum* [*McCollum* v. *Board of Education* 333 U.S. 203 (1948)] decision in 1948. We think that they were right decisions. The point is that many, many private schools have come into being under church auspices as a result of these decisions in order that these schools may be pervasively religious.

We are made uneasy by the fact that the equal protection clause is certainly in jeopardy since there is such a variety of churches and church schools in this country, which makes it almost impossible to avoid some kind of preferential treatment, for example, those schools that are a part of a parochial school system vis-a-vis schools which are individually owned, operated and maintained—such as Jewish and Lutheran schools. The schools of the latter constitute the vast majority of Protestant and Jewish schools throughout this country.

We maintain that the purpose of this IRS ruling is laudable, but laudatory though the purpose may be the ruling fails to pass the basic tests of constitutionality. As the U.S. Supreme Court has reiterated more than a dozen times, a government act may neither inhibit nor advance religion and such an act must avoid excessive entanglement between church and state. This ruling fails on both counts in spite of the laudatory and secular purpose of the ruling itself.

Thank you.

Senator PACKWOOD. Does the Baptist Joint Committee on Public Affairs speak for the organizations that belong to it?

Mr. WOOD. Yes. The committee is comprised of official representatives, elected or chosen by each Baptist body including the general secretaries as well as pastors and lay persons.

Senator PACKWOOD. Does the Baptist Joint Committee on Public Affairs pass resolutions on various matters of public importance?

Mr. WOOD. Indeed.

Senator PACKWOOD. Are you the same Mr. Wood that I talked to a couple of years ago on abortion?

Mr. WOOD. I might say that all the national bodies that have a position on this subject, have an identical position with the Baptist Joint Committee. The Baptist Joint Committee may take a position which is not contrary to one of the national Baptist bodies, at least not in conflict with a formulated position of anyone of its member bodies.

Do you understand the distinction?

Senator PACKWOOD. I understand.

If any of the churches—the position would be the same as the joint committee. Some of them may not have taken their position yet.

Mr. WOOD. Five times, for example, the Southern Baptist Convention has supported the Supreme Court decisions on abortion. The American Baptist Churches in the U.S.A is a charter member of the Baptist Joint Committee and, a decade ago, supported such a position and continues to reaffirm a woman's right of choice for abortion services.

When I speak today of a position of the Baptist Joint Committee, it is one which has been formalized by this body. The hearings today have been very, very good.

Senator Packwood, if I may add as a postscript, I think that in light of what you were just saying, it is wise for you to understand my place here today.

Baptists have not been deeply involved in parochial schools. The Baptist Joint Committee, and Baptists generally, have been ardent supporters of public education in this country and it remains so. But, on this issue, we feel it is a first amendment issue. That is why I am here. We see this as a clear intrusion of the IRS into the life of the churches.

We maintain that the first amendment is such that it has provided throughout our history that churches and synagogues, religious institutions and groups, may have an ethnic identity or a national origin identity and their inviolability as a voluntary association is guaranteed by the constitution. We would vigorously defend, for example, the constitutional right of ethnic churches or denominations, be they Russian, Armenian, Black Muslim, Mormon, or Korean. That is a part of the membership pattern and, as such, is guaranteed by the free exercise of religion, which is based on the principle of voluntary association.

We think this principle is bound up with the enrollment of church schools—the vast majority of which are owned, operated, and maintained by local congregations.

Senator **Packwood**. Part of the debate is going to be because of the tremendous antieducation bias that exists in this country. I am not sure where that springs from. There was a time in this country where there were no public schools in the sense that we understand public schools today. Public education was provided by church schools at public expense.

So we have come a long way from what the founding fathers saw about religion and whether or not there was some kind of connection, call it what you want.

Sir, the testimony has been good, and I appreciate everyone's patience.

We have one more witness, Dr. Allen.

STATEMENT OF W. WAYNE ALLEN, CHAIRMAN, BOARD OF TRUSTEES, BRIARCREST BAPTIST SCHOOL SYSTEM, MEMPHIS, TENN.

Mr. **Allen**. I will be very brief in what I have to say and not repeat the previous testimony. I am Wayne Allen, chairman of the board of trustees, Briarcrest Baptist School System, Memphis, Tenn., the largest private school in the United States.

Our school will be a reviewable school. We have intervened in the law case in which this proposal has come forward. We are the only spokesman for private education in the case in which the Commissioner gave testimony that the regulation has come from.

If Briarcrest Baptist School was Catholic and not Baptist it would not be a reviewable school. If Briarcrest Baptist School was formed 17 years ago, rather than 7 years ago, it would not be a reviewable school. If Briarcrest Baptist School was located in New York City rather than Memphis, Tenn., it would not be a reviewable school. To be a reviewable school because of religious denomination, year of formation, or location is discriminatory. We will be a reviewable school. We may be one of the target schools in America because we are the largest school.

We have pursued every avenue that we know to recruit minority students and yet, in our community, the black leadership of the NAACP vigorously opposes any black student attending a private school.

You mentioned that we had such a mindset in our part of the country that is against private education, that there is no concept between private and public schools. They are working in cooperation with each other.

Senator **Packwood**. Who is the spokesman for the NAACP?

Mr. **Allen**. Mrs. Maxine Smith Smith, Executive Director, NAACP.

Senator **Packwood**. Because your schools discriminated especially, or because a black pastor would be a disgrace to his race because private schools are bad, period, whether they discriminate or not?

Mr. **Allen**. Her position is the same as the position referred to in the Internal Revenue procedure. The position referred to in the procedure is that any school formed during public school desegregation is discriminatory and since discrimination is bad, the school should be destroyed without looking at the individual facts regarding each particular school situation.

Right now there is prejudice against private Christian schools located within the desegregating communities and this prejudice is bringing pressure on the black community to boycott these newly formed Christian schools. The Internal Revenue Service audited Briarcrest several years ago. They sent two agents to spend a week checking our admission policy. They interviewed black leadership in the city and asked what their opinions were about Briarcrest admissions policy and blacks attending private schools. One of the black pastors, Reverend James Netters, told the Internal Revenue Service agents that there was tremendous pressure on black families and students not to attend private schools.

The IRS is not asking for nondiscriminatory admission policies. The procedure does not determine whether your admission policy is nondiscriminatory. What they are asking is, what have your results been in recruiting black students.

What this committee must understand is that the school has no control over the results. We can make the effort, but the school cannot, unless you are going to pass a bill to have forced busing in private schools, you cannot make a black parent enroll his child in a private school.

What the parents of black children do is out of our control. Our school can do all within its power to recruit and to seek minority students. We have no way to force minority students to attend, because this procedure requires us.

In conclusion, the strong objections on the part of hundreds of thousands of citizens to the original proposed revenue procedure has caused a revision of the proposed procedure. This revision, however, is primarily cosmetic. The unfair, arbitrary, and discriminatory presumption of guilt remains.

The proposed procedure constitutes an unconstitutional attack upon religious education in the United States. The vast majority of the schools which would be affected by the proposed procedure are Christian, religious schools. Furthermore, the proposed procedure deliberately has excluded the majority of Catholic and Jewish schools and now aims its attack almost exclusively at Protestant schools—an especially invidious religious discrimination.

While the disastrous effects of busing on the public school systems of the Nation have no doubt contributed to the success of private schools since that practice began, it is totally unfair, arbitrary and wrong to presume that every private school created or expanded during this period has done so in order to escape racial integration. It is totally unconscionable to invoke punitive government actions against hundreds of thousands of Protestant Christians whose only motives are to provide their children with an excellent education in an acceptable moral atmosphere.

The existing Revenue Procedure 75-50 already requires tax exempt schools to pursue nondiscriminatory policies if they are to retain tax exemption. It contains an invitation to minorities to file a complaint against any exempt private school which discriminates in practice. There have been few, if any, complaints filed.

Even if the IRS should rightfully be engaged in shaping national social policies, its existing procedures are more than adequate to do so.

The proposed procedure will not open to minorities any school doors. The doors of the tax exempt schools are already wide open. The blacks refuse to attend such schools.

The proposed regulation will have one primary effect—to punish private schools for having come into existence subsequent to public school integration.

It should be totally, completely and finally abandoned.

Senator **Packwood**. Thank you very much.

[The prepared statements of the preceding panel follow:]

STATEMENT OF THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

My name is William Kelly, Superintendent of Christian Unified Schools of San Diego and board member of the Association of Christian Schools International. On behalf of the Association I thank you for the opportunity to be heard at this important congressional hearing. Our Association has 1,042 schools in the United States with a combined enrollment of 185,000 students. ACSI represents two types of Christian schools—both types having the same religious purpose. Eighty percent of our schools are operated by Evangelical Bible-believing churches who consider their Christian schools an integral part of their church ministry. Typically, these church operated schools function under the nonprofit corporation of their sponsoring church. It is therefore impossible for the IRS to deny the tax exemption of a church operated Christian school without denying the tax exemption of the entire sponsoring church congregation. Consequently, contributions in the form of tithes and offerings to the church that offers a school as a ministry to the community would not be tax deductible. The average size Christian school in our Association is 218 students. Most often the church congregation that operates a Christian school is several times larger than its school's student enrollment. If you permit the Internal Revenue Service to nullify the tax advantage of contributions to churches you will indeed engender the disfavor of a large segment of our society and of your voting constituency.

Twenty percent of the Christian schools in the Association of Christian Schools International are independent religious Christian schools formed by groups and boards of Christian parents whose sole purpose in doing so is to provide Christian school education for their youngsters. These schools are as religious in nature and purpose as the church operated schools. Like the church sponsored schools within our association these independent religious schools do not discriminate racially or denominationally. Their doors are open to parents of any race who want Christ-centered education for their youngsters. Tax deductible contributions are even more significant to these independent religious schools because they have the additional financial burden of providing the property and buildings required by their students whereas a church sponsored school is most often housed within the educational structure of the sponsoring church. Tax deductible contributions to an independent religious school are critical in keeping the tuition within reach of average income parents who choose to provide Christian education for their children.

The schools I represent are religious educational institutions be they independent or church operated. In my view there is a profound difference between a tax exempt Christian school and a tax exempt private school. I am here as a knowledgeable witness to tell you that our Christian schools do not discriminate racially. Academically our students are performing, according to the Stanford Achievement Test, a year and two months ahead of public education and we educate our students at less than half the cost of tax supported schools. Interestingly enough the largest professional group among the parents who send their children to Christian schools are public school teachers and principals.

In my view, if this congressional committee wishes to encourage the Internal Revenue Service to impose a racial quota system on tax exempt private schools who do not have a religious purpose that is a decision that should be made entirely separate from the awesome decision to impose such regulations on religious educational institutions be they in the form of a church operated school or an independent religious school. The Internal Revenue Service has a right to impose a racial quota system on a Christian school, Catholic or Hebrew school only to the extent that the IRS has a right to racially balance a congregation of a church or synagog.

It, of course, does not have that right even though the church is tax exempt. Tax exemption is not a license for government regulation.

As you contemplate the issues in support of or opposition to the proposed revised IRS regulations pertaining to tax exempt private schools I urge you to consider the following:

(1) The U.S. Supreme Court has consistently held that religious schools are indeed religious and that the separation of church and state principle bars government from excessive entanglement with them. Any attempt to regulate private education in America should exclude religious educational institutions. A basic American principle requires that the church not impose itself upon the government and that the government not entangle itself with the church. It will be a sad day in American history if either the church or the state ever steps over that line.

(2) Christian schools would not exist but for their religious purpose.

(3) Although Christian religious schools and their churches exist apart from the government, Christian schools are among the best friends the government has. Christian schools save the government billions of tax dollars in relief from educating Christian school students. Christian schools teach their students that government and government leaders are of God and are to be highly regarded. Christian schools raise the literacy level of America by offering a quality of education that is above the national norm and most important, Christian schools enrich the moral character of American society.

I urge you not to be a party to any rule or regulation by any agency of government that would impede the progress of Christian schools. They are vital to the quality of life in America.

STATEMENT OF THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS

I am Arno Q. Weniger, Jr., and I speak as Executive Vice President of the American Association of Christian Schools which is comprised of almost 850 member schools across the country enrolling over 135,000 students. Our schools are located in 44 of our 50 states, and we have affiliated state chapters in 33 of these states. If present trends continue, the American Association of Christian Schools will have over 1,000 schools next year with an enrollment of over 175,000 students.

The American Association of Christian Schools is comprised of Christian schools, the great majority of which, perhaps 95 percent, are affiliated, controlled, and directed by individual local churches. These schools are ministries of the local churches and are likewise administered by the deacons and pastors of the churches. Our schools are independent and autonomous. They seek to fellowship with the American Association of Christian Schools which provides services and information along with the promoting of Christian education across America. Our Association has no authority over any of our schools and therefore we are unable to speak directly for our schools. It must also be understood that these schools can only be looked at in the light of their relationship to the church. Almost without exception, the pastor of the church is the superintendent of the school. Often-times he teaches a class or two, preaches in the chapel, and gives direction to the staff of the school. Deacon boards are school boards and business on behalf of the school is conducted along with the other business of the church. These schools are without a doubt as religious and spiritual as any function of the church.

I have spoken in many of these schools, their state association meetings, and as well their regional conventions from Fairbanks, Alaska to Miami, Florida. From the tip of Maine to the shores of Northern California. I do not know of any school in our Association who excludes any racial group. In fact, our schools are mixed with children of all races. Admission to these church-schools is based upon spiritual standards rather than ethnic background. Children must be willing to accept not only the spiritual and moral standards of the schools but their parents must, as well, agree to its importance in order to maintain enrollment in these church-schools.

The parents of students enrolled in these Christian Schools are not only paying taxes in support of the public school system, but they are likewise paying tuition of considerable amount in order to see to it that their children are educated academically, morally, and spiritually. Our parents will continue to be willing to make a sacrifice for the sake of their children. Our schools do not accept government aid, refuse the Title Programs of the public school system, and wish to continue to be totally free and independent of bureaucratic control and funding.

Let me now speak concerning our opposition to the Revised Revenue Procedure released February 9, 1979. This opposition was delineated by letter to the Internal Revenue Service, voiced at their Hearings in December, reaffirmed in testimony before the House Ways and Means Subcommittee on Oversight on February 21, 1979, and is once again given before this committee.

1. It is our firm belief that the Internal Revenue Service has no constitutional authority for these Revenue Procedures. The application of these procedures to "church-related and church-operated schools" is an abridgment of the First Amendment of the United States Constitution. In the light of the recent Supreme Court decision in NLRB v. CATHOLIC BISHOP OF CHICAGO, it is apparent that it is the right of church-related institutions to manage their own affairs. The values enshrined in the First Amendment plainly rank high "in the scale of our National values."

2. It is also our feeling that the IRS has no statutory authority to impose these Revenue Procedures upon our church-schools. In the words of William J. Lehrfeld, our legal counsel, "The Internal Revenue Service has no statutory authority to impose certain filing, recordkeeping notice procedures on churches which, as part of their ministry, happen to conduct an elementary or secondary school for the benefit of the children of it's congregation or others."

3. Inasmuch as our schools are ministries of our churches for the Internal Revenue Service to invoke these procedures upon our ministry; namely, our Christian school which meets Monday through Friday, leads us to believe that the government could also impose these sorts of restrictions upon our other ministries. If our day schools must meet a certain racial mix, why not our Sunday nursery, or our bus ministry, etc.

4. To deny tax exemption based upon the criteria of these Revenue Procedures would be to deny tax exemption to our churches. Our schools are not tax exempt in and of themselves, they are only tax exempt because of the tax exempt status of our churches. Our churches do not hold tax exempt status by virtue of governmental action, but hold that exempt status by its very nature. The Internal Revenue Service only recognizes that exempt status with the issuance of a letter of exemption. To deny that exemption based upon failure to meet these Revenue Procedures is a veiled threat to the church and is without a doubt an infringement on the free exercise of our religion.

5. If these Revenue Procedures were to continue to stand it would be the beginning of a great profusion of governmental entanglement with religion. Not only would the Internal Revenue Service no doubt have reason to proliferate this entanglement but as well other governmental agencies would do likewise.

6. These Revised Revenue Procedures have made an accommodation to certain classes of religious organizations and denied that exemption to others. Section 3.03(b) and 3.03(c)(6) exempt in essence Hebrew Day Schools, Moslem Schools and as well the Amish. Section 3.03(b) also makes accommodation for "a particular school which is part of a system of commonly supervised schools." With very few exceptions, only the Roman Catholic church operates a system of schools. The Revenue Procedures clearly give special status to these schools over other schools. It seems that it is the IRS feeling that those church-schools which are of a "long-standing practice of religion" or which are part of a "religious denomination" are the only ones that deserve any First Amendment protection because of special religious circumstances influencing student enrollment composition. Our schools are predominantly independent of any denomination, and the vast majority are operated as an inseparable ministry of the local church. Our schools are thoroughly religious. Every subject is based upon the Bible, and the student is taught that all truth comes from God. Many of our church schools are new and have recently been founded. The IRS is clearly guilty of discrimination against our independent church schools with the implementation of these Revised Revenue Procedures.

7. We are as well in opposition to these Revenue Procedures because of their subjective nature and the great amount of authority and latitude given to the Internal Revenue Service. It is clear to us, and we would hope as well to the government, that the Internal Revenue Service is hereby attempting to regulate bona fide churches and their ministries which they have established as an integral part of their religious purpose.

8. Inasmuch as the Supreme Court determined in REGENTS OF UNIVERSITY OF CALIFORNIA v. BAKKE, that the racial quota system in a state operated school was unconstitutional based upon the 5th & 14th Amendments, it would seem even more unconstitutional in a church-school in the light of the First Amendment. How the Internal Revenue Service, the courts, or this Senate Subcommittee can come to any other conclusion is beyond my comprehension.

In the light of our testimony of objection, may I state that we are not here today to quibble about inserting certain language in these proposals to make them more palatable to the Christian Schools of America. My forefathers, Baptists in Virginia, languished in jail until the establishment of that First Amendment which reads, "Congress shall make no law respecting the establishment of religion or prohibiting the exercise thereof." I respectfully urge this committee, and as well both Houses of Congress, to restrict the Internal Revenue Service from implementing these Revenue Procedures, particularly as they affect the Christian church-schools of our nation, in the face of our Constitution and the First Amendment.

STATEMENT OF COUNSEL FOR AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, NORMAL, ILL.

This memorandum of law is counsel's statement for the American Association of Christian Schools, Normal, Illinois concerning the recently proposed revisions in the revenue procedures for private schools. The aim of the proposed procedure is to assure that private elementary and secondary schools are not conducting their educational programs on a racially discriminatory basis. However, the Congress, in its wisdom, has chosen to treat churches and church activities differently from the activities of all other exempt organizations. Consequently, as this memorandum will show, the Internal Revenue Service today has no statutory authority to impose certain filing, recordkeeping or notice procedures on churches which, as part of their ministries, happen to conduct an elementary or secondary school for the benefit of the children of their congregations or others.

I

The American Association of Christian Schools does not support segregation of the races in education nor any other form of invidious discrimination. Every child, regardless of race, color, national origin, sex or religious belief, has a fundamental right to the best education his or her community, church or parents can provide. Today certain social trends and Constitutional strictures, such as the Establishment Clause of the First Amendment, have rendered public schools devoid of religious thoughts and principles. As a result, parents have turned to Christian schools, or any parochial school, to foster a Christ-centered philosophy and shun a humanistic or materialistic view of life.

II

Prior to World War II, federal courts made numerous decisions concerning certain organizations which fed their profits to charity and, on the basis of such activities, claimed that they were charitable organizations entitled to income tax exemption. See, *Roche's Beach, Inc.* v. *Comm'r*, 96 F.2d 776 (2d Cir. 1938). Most federal courts agreed with this claim and, at one point in time, so did the Internal Revenue Service. See G.C.M. 21610, C.B. 1939-2, 103. With the advent of the War, it became obvious that these court decisions had created serious possibilities for abuse as well as serious revenue losses. In 1942, the then Assistant Secretary for Tax Policy suggested to Congress that it impose a tax on certain organizations with certain forms of business income to prevent unfair competition between tax exempt entities and taxpaying entities. See Hearings Before Committee on Ways and Means (Revenue Revision of 1942), 77th Cong., 2d Sess., p. 89.

Congress expressed its reluctance because it had no information concerning the extent of the abuse potential and apparently urged the Internal Revenue Service to provide information. As part of its attempt to do so, the IRS published T.D. 5125, C.B. 1942-1, p. 101. In general terms, that regulation required information to be submitted as part of an exemption application and ruling process which the Internal Revenue Service had developed. The 1942 addition to the information return requirement was stated as follows:

"All organizations claiming exemption under Section 101(5), (6), [now, IRC Sec. 501(c)(3)] except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14), shall also file with the other information specified herein the return of information on Form 990 relative to the business of the organization of the last complete year of operation."

Apparently in response to criticism, the provisions of this regulation were modified later in the year by T.D. 5177, C.B. 1942-2, 123. The restated regulation provided:

"When an organization has established its right to exemption, it need not thereafter make a return of income or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created, except that every organization exempt or claiming exemption under Section 101(5), (6), except organizations organized and operated exclusively for religious purposes, (7), (8), (9), or (14) shall file annually return information on Form 990 with the collector for the district in which it is located the principal place of business or principal office of the organization; provided, however, that such return shall not be required of an organization which is organized and operated exclusively for educational purposes, or educational and religious purposes, if no part of its net earnings or assets are distributable to any private shareholder in liquidation or otherwise and if, in the case of an organization privately owned or operated, the Commissioner is advised of any increase in the compensation of its owners, managers, trustees, or directors over the amount of such compensation for the last year for which its exemption under Section 101(6) was approved by the Commissioner. Form 990 will not be required of charitable organizations of the type exempt under the preceding sentence from the requirement of filing such returns, nor of separately conducted charitable organizations meeting the above conditions as to distributions and compensation nor of charitable organizations operated under the control of the state of any political subdivision thereof."

For reasons which are not entirely clear, the Congress chose to amend the statutory provisions governing return and recordkeeping requirements for all taxpayers in a way which relates to subsequent interpretations of the reporting requirements for exempt organizations. For further background, see Report of Committee on Exempt Organizations, ABA Tax Section, 22 The Tax Lawyer (Summer, 1969) at 1023-1025. Under the 1939 Code, there was generally provided the following:

"§ 54. Records and Special Returns. (a) By taxpayer.—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

That particular provision is substantially the same as Section 6001 of the Internal Revenue Code of 1954, Notice of Regulations Requiring Records, Statements, and Special Returns.

Several years later, during the course of consideration of the Revenue Act of 1943, the Congress chose to override provisions of Section 54(a) of the 1939 Code, which had authorized the issuance of T.D. 5125 and T.D. 5177, by enacting into law an amendment to Section 54 dealing only with exempt organizations. The ostensible purpose was to obtain information concerning exempt organizations which might be engaging in tax evasion and avoidance inconsistent with the income tax exemption granted to them. See, e.g., H.R. 871, 78th Cong., 1st Sess. C.B. 1944, 901 at 920. See also, S. Rep. 627, 78th Cong., 1st Sess., C.B. 1944, 973 at 990. Section 54(f), as enacted into law in 1944 provided as follows:

"§ 54. Records and special returns. (a) By taxpayer. Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * * * *

(f) By organizations. Every organization, except as hereinafter provided, exempt from taxation under section 101 shall file an annual return, which shall contain or be verified by written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, made by regulations prescribed, and shall keep such records, render under oath such statements, and make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. No such annual return need be filed under this subsection by any organization exempt from taxation and the provisions of 101-(1) which is a religious organization exempt under Section 101(6) * * *."

Thus, it is clear from the original writing of Section 54(f), which became Section 6033 in the 1954 Code, that only the filing of a return was being precluded by Section 54(f) in the case of religious organizations. A religious organization exempt under Section 101(6) of the 1939 Code (now Section 501(c)(3) of the 1954 Code) would be required, by Section 54(f), to keep such other records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, could from time to time prescribe.

In 1954, when Section 54(a), among others, was given its own particular provision and set aside from other recordkeeping requirement provisions of Chapter 61 of the 1954 Code, the information return requirements as well as the recordkeeping and related requirements for exempt organizations, were codified as Section 6033. There is no reason to believe that the mere existence of separate Code sections in any way detracts from the obvious fact that Section 6033 provides a clear differentiation and distinction between the Commissioner's powers over exempt organizations and those he might otherwise have under the more general provision of Section 6001. There is nothing in the legislative history of the 1954 Code, including Sections 6001 and 6033, which suggests that the 1939 exception (Section 54(f)) to the general recordkeeping and statement requirements (Section 54(a)) were not meant to continue to be exceptions when codified in different sections.

In 1969 Congress again reexamined the recordkeeping and similar requirements imposed upon exempt organizations by Section 6033. On August 2nd, Mr. Mills introduced the Tax Reform Act of 1969, H.R. 13270, which, among other things, had the effect of striking all exemptions from Section 6033 so that no organization would have any exemption from any of the stated provisions. The exemption provision in the House-passed version of the Tax Reform Act of 1969 was stated as follows:

"(a) Organizations required to file.—(1) In general.—Every organization exempt from taxation under section 501(a) shall file * * * such other information for the purpose of carrying out the Internal Revenue laws as the Secretary or his delegate may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe * * *

(2) Exceptions from filing.—The Secretary or his delegate may relieve any organization under paragraph (1) to file an information return from filing such return where he determines that such filing is not necessary to the efficient administration of the Internal Revenue laws."

Again, following the direction of the 1939 Code, the discretion which the House initially was going to grant to the Secretary or his delegate was only to relieve certain organizations from filing returns and not from any other compliance requirement stated in the text of Section 6033(a)(1).

As a result of testimony from church organizations, the Senate Finance Committee redid the House version (H.R. 13270, Section 101(d)(1)). Hearings Before the Committee on Finance, U.S. Senate, 91st Cong., 1st Sess., at 2095 and 2100. The Finance Committee version of amended Section 6033(a)(2) stated:

"(2) Exceptions from filing.

"(A) MANDATORY EXCEPTIONS.— Paragraph (1) shall not apply to—

"(i) Churches, their integrated auxiliaries, and conventions or associations of churches * * *"

The Finance Committee did not alter the House-passed version of the discretionary exemption provision in their proposed Section 6033(a)(2). The Senate passed the Section 6033 amendments of the Finance Committee, which were ultimately passed by the full Congress. Today, Section 6033 clearly provides a mandatory exemption from the recordkeeping and all filing requirements contained in Section 6033(a)(1). Congress made a conscious decision not simply to exempt churches from the information return requirements, as it did under the 1939 Code and continues to do under certain discretionary exemption provisions of what is now Section 6033(a)(2)(B), but from all of the supplementary administrative powers granted IRS.

One can argue interminably over questions of statutory construction. Such arguments have led courts to believe that certain construction maxims should be used where there appears to be a facial inconsistency between two separate provisions, such as Section 6001, which seems to grant a blanket privilege to the Internal Revenue Service to require certain information and Section 6033 which exempts churches from filing information or otherwise complying with the recordkeeping and return requirements imposed upon other exempt organizations. The construction maxim I refer to is "inclusio unius est exclusio alterius." When applied to the apparent contradictions between Section 6001 and Section 6033, the maxim suggests that if the statute specifically exempts certain organizations from the application of certain rules and requirements, another, more general statute cannot be construed to impose those same requirements. Thus, if churches are expressly exempted from recordkeeping requirements similar to those imposed upon all other taxpayers, this maxim of construction would prevent the government from urging that the scope in Section 6001, containing substantially the same language affecting all other taxpayers, is broad enough to apply to the exempted taxpayers.

As noted by the Supreme Court in *Ford* v. *United States*, 273 U.S. 593 at 612, "the * * * maxim properly applies only when in the natural association of ideas in the mind of the reader that that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which has been omitted must be intended to have the opposite and contrary treatment." Churches are "omitted" from the operation of Section 6001. Consequently, churches are not obliged to file notices, make statements or go through the rituals prescribed by the "school" procedures which are imposed on schools not owned and operated by churches.

The Congress may choose to enact legislation to more narrowly restrict the exemption accorded churches, their conventions and associations, but as of this date it has chosen not to do so. In fact, the trend is in the other direction. Therefore, this Subcommittee should take its oversight responsibility to heart and determine whether or not the Internal Revenue Service is seeking to frustrate the laws of the land by ignoring Section 6033(a)(2)(A)(1).

III

The regime imposed upon exempt organizations, including the notice requirements for private letter rulings, reinforces the view that the Internal Revenue Service is to approach churches in a far more different posture than all other exempt organizations. This is underscored by the fact that, in 1969, the Congress chose to require new Section 501(c)(3) organizations to file a "notice" with the Internal Revenue Service that they were going to claim an exemption under Section 501(c)(3) of the Code. See, IRC Section 508(a). Failure to file a timely notice meant that such organizations, if described in Section 501(c)(3), would not be exempt from federal income tax during the untimely period (beginning with date of organization) and contributions made during the untimely period would not be deductible. See, IRC Section 501(d). Again, Congress chose not to impose the notice requirement on "new" churches organized after October 9, 1969.

As every sensible person realizes, the Internal Revenue Code grants exemptions from federal income tax as it does grant taxpayers the right to deduct contributions to churches, among others, for federal income, estate and gift tax purposes. While the Internal Revenue Service may suggest that the requirements of filing an application for exempt status and receiving a private letter ruling on such status, are a condition precedent to exemption, no serious person gives that idea any credence. Certainly the Congress did not in 1969 when, in commenting on proposed Section 508(a), it expressly provided, as follows:

"Present law. Under present law, an organization is exempt if it meets the requirements of the code, whether or not it has obtained an 'exemption certificate' from the Internal Revenue Service." See, S. Rep. 91-552, 91st Cong., 1st Sess., C.B. 1969-3, 423 at 458.

In noting the fact that the Code grants exemption, not the Internal Revenue Service, the report underscored the fact that the private letter ruling system, used for all Section 501(c) organizations, is merely a practice of administrative convenience enabling the exempt organization and the Internal Revenue Service to have some satisfactory evidence of the apparent agreement between the parties as to the organization's status. The Finance Committee made it clear that churches were to be exempted from this ruling requirement along with the requirement that they rebut any presumption that they were "private foundations." (See Section 508(b) etc.)

"Conventions or associations of churches, whether or not the Treasury acts, should not be required to apply for recognition of their exempt status in order to be exempt from tax nor should they be required to file with the Internal Revenue Service to avoid classification as private foundations." See, S. Rep. 91-552, supra at 459.

These additional exemptions further underscore the strong desire of the Congress that churches not be subject to oversight and regulation which would otherwise apply to other exempt organizations enjoying essentially the same tax benefits of the Internal Revenue Code.

In one other fashion, the Congress asserted its right to grant to churches what it would otherwise withhold from all other exempt organizations. In H.R. 13270, the House of Representatives agreed that because churches were to become subject to the unrelated business income tax, a specific authority to examine churches in connection with such revenues, should be inserted in the Code. However, in Section 121(f) of the House version of H.R. 13270, the Ways and Means Committee inserted a restriction limiting that authority to the examination of the books of account of a church. Proposed Section 7605(c) only required a belief on the part of the Internal Revenue Service that the church was engaged in unrelated business activities and notified the organization, after a high-level clearance by Internal Revenue officials, that it intended to perform the examination. That version passed the Senate Finance Committee in substantially the same form, and today represents the first sentence of Section 7605(c). Nevertheless, Senator Wallace Bennett of Utah expressed obvious concern over the breadth of freedom apparently suggested by the House language and proposed an amendment which is now the second sentence of Section 7605(c).

"Mr. Bennett. Mr. President, the other amendment refers to what I think is a desirable clarification of the language in the bill which, for the first time allows the Internal Revenue Service to audit churches.

"This has not been possible under previous law. And the language of the bill (Section 121(f) of H.R. 13270) I think, is too loose.

"The Treasury agrees with me. I am offering alternate language which adds on page 148, line 9 these limiting requirements:

"On page 148, line 9, strike out the quotation mark and add: No examination of the religious activities of such an organization [church, association or convention of churches] shall be made except to the extent necessary to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.

"Mr. President, that is the title imposing a tax on unrelated business income.

"There is a fear the language would open it up so that the IRS could go through all the churches books that pertain to religious activities.

"They did not intend to do this. Therefore, the IRS agrees with me that the limiting language will have uses. It is my understanding that the Chairman agrees with me and is willing to take the amendment to conference.

"Mr. Long. I have no objection to the amendment, Mr. President."

See, Cong. Rec., Dec. 6, 1969 at S. 15951 (daily ed.).

The language seems on its face explicit that no examination of the religious activities can be made of a church except to determine if the organization is a "church." Thus, an examination cannot be made to determine compliance with other aspects of church activities, unless they directly infringe upon those considerations which cause a religious organization to be deemed by law to be a church.

Obviously, the question next becomes what is a "church" for purposes of the Internal Revenue Code. In January 1978, the Commissioner of Internal Revenue observed in a speech to an audience of tax practitioners that the Internal Revenue Service had certain criteria for making findings of law that an organization was a church. As quoted from the Commissioner's speech, these criteria, which were never published as a regulation or ruling, are as follows:

"The determination of whether a particular organization is a church must, therefore, be made on a case by case basis. It may be helpful to list the characteristics we utilize: (1) a distinct legal existence (2) a recognized creed and form of worship (3) a definite and distinct ecclesiastical government (4) a formal code of doctrine and discipline (5) a distinct religious history (6) a membership not associated with any other church or denomination (7) a complete organization of ordained ministers ministering to their congregations (8) ordained ministers selected after completing prescribed courses of study (9) a literature of its own (10) established places of worship (11) regular congregation (12) regular religious services (13) Sunday Schools for the religious instruction of the young (14) schools for the preparation of its ministers. We are aware that few, if any, religious organizations—conventional or unconventional—can satisfy all of these criteria. For that reason, we do not give controlling weight to any single factor. This is obviously the place in the decisional process requiring the most sensitive and discriminating judgments. We are aware of this and that awareness is, perhaps, the best guarantee that we are trying to administer this difficult area carefully and evenly." See, I.R. 1930 reprinted in Prentice Hall Federal Income Taxes, Vol. 9 for 1978 at ¶54,820.

It is obvious from the foregoing that neither the Commissioner, nor common sense, believes that the race, color, or national origin of a religious organization's congregation, its ministers, or its employees or the children in its parochial school system have any weight in determining whether or not the organization is a "church." To my knowledge, neither the Internal Revenue Service nor any agency of government has suggested that a church may not, by law or by practice, limit its congregation to individuals of a certain race, color, or national origin. While few churches may do this, there is no legal precedent which supports the theory that race has a role in determining the legal status of the organization as a church. In fact, the precedent is decidedly against the IRS. See, *Bob Jones University* v. *United States*, 43 AFTR 2d 79-587 (D.S.C. 1979).

Obviously, the next question to be addressed is what does the term "religious activities" embrace in the administration of IRC Sec. 7605(c). If we are to read the cases involving First Amendment freedoms, including the cases dealing with the Establishment clause, it is quite clear that church schools are religious activities. For example, in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) at 616, the Supreme Court stated, as to Catholic parochial schools, as follows:

"On the basis of these findings the District Court concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.'

The various characteristics of the schools make them a 'powerful vehicle for transmitting the Catholic faith to the next generation.' This process of inculcating religious doctrine is, of course, enhanced by an impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose." [Footnote omitted]

"The substantial religious character of these church-related schools give rise to entangling church-state relationships of the kind the Religion clauses sought to avoid."

Accord, *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 99 S. Ct. 1313 at 1319 (1979). Parochial schools, regardless of the religion involved, are substantial religious activities, even though they may be teaching secular subjects in part, and even though they may be using text books like those used in public schools; thus, Section 7605(c) bars the IRS from any examination of them. No church school should comply with Rev. Proc. 75-50 or any new procedure because to do so would encourage further unlawful activity by the IRS.

There are no criteria, statutory or administrative, which can dictate the racial composition of the congregation of a church, its ministry or its employees. Accordingly, a church will remain a church, and exclusively religious, for purposes of Section 501(c)(3) regardless of those conditions. It is no function of government to tell any church what its ministry may be; nor is it government's function to dictate to the congregation how it should practice its religious activities relating to parochial schools. The Congress has specifically provided exceptions for churches which do not apply to any other institutions.

In closing, your attention is directed to the decision of *First Unitarian Church* v. *Los Angeles*, 357 U.S. 546, in which the State of California required an oath from the church hierarchy stating that the church membership would not overthrow the government. Failure to execute the oath meant that the church would not be entitled to tax exemption. Mr. William O. Douglas, an eminent civil libertarian, stated as follows:

"The principles, moral and religious, of the First Unitarian Church compel it, its members, officers, and ministers, as a matter of deepest conscience and belief, to deny power in the state to compel acceptance by it or any other church of this or any other oath of forced affirmation as to church doctrine, advocacy or beliefs.

"We stated in *Girouard* v. *United States* [citation omitted] the 'test oath is abhorrent to our tradition.' See *American Communications Association* v. *Dowd* [citation omitted]. The reason for that abhorrence is the supremacy of the conscience in our constitutional scheme. As we stated in *West Virginia Board of Education* v. *Barnett* [citation omitted] 'if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or for citizens to confess by word or act their faith therein.'

"There is no power in our government to make one bend his religious scruples to the requirements of this tax law."

That statement concerning the conscience of churches to carry forward their own religious activities as they conceive them without regard to Government dictates, remains as true today as when it was written by Mr. Justice Douglas in 1958.

GRACE MEMORIAL CHURCH,
Colmar Manor, Md., April 17, 1979.

U.S. SENATE,
Committee on Finance, Subcommittee on Taxation and Debt Management,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATORS: I strongly oppose the revised guidelines of the IRS on the tax exempt status of private schools. I also strongly support Senate Bill 103 and 449 and urge that these important bills be passed. Here are my reasons.

1. The 1978 resolution passed by the independent fundamental churches of America at its annual convention: (The I.F.C.A. is an organization of 1,400 ministers and over 1,000 churches)

Resolution on christian schools:

Whereas, the Word of God teaches that the home is the basic unit of society, and that God has entrusted to parents the responsibility for the education of their children (Deut. 6:6, 7; Eph. 6:4); and

Whereas, state controlled education has become increasingly humanistic and otherwise contrary to a Scriptural philosophy of life; and

Whereas, the Christian school movement seeks to restore the cooperation between the church and the home in education as was the pattern at the time of the founding of our country; be it therefore

Resolved, That the Independent Fundamental Churches of America, meeting at its 49th annual convention in Estes Park, Colorado, June 24-30, 1978, urge its constituency to support, by whatever means and abilities God has given them, the Christian school movement in its effort to establish a biblical base of education; and be it finally

Resolved, That we strongly protest the encroachment upon this movement by government agencies which seek to hinder and unnecessarily control its ministry.

2. The insensitivity of the IRS.

I heard 116 witnesses last December with 100 in opposition, especially over the issue of 'reviewable' schools. The IRS News release IR-2091 stated that the I.R.S. issued the revised guidelines after considering public comments. That simply is a lie. With 5-1 opposition, the I.R.S. only reworded its original guidelines. It does not reflect the majority of those at the December hearings. They simply have not paid attention to their own hearings.

3. Contradictions and inconsistencies in the IRS revised proposal:

Their definition of a nondiscriminatory policy is stated in Section 3.01 "the school admits the students of any race . . . does not discriminate on the basis of race." In order to convince the IRS of nondiscrimination, the 'reviewable' school must actively and vigorously recruit minorities (4.03-1) and they must convey clearly to the affected minority community that they are welcome at the school (Sec. 4.03). The IRS does not know the basic difference between 'any race' and 'all races' or 'every race'.

Many of our schools are in metropolitan areas with many minority and ethnic groups. An affected minority could be inadvertently omitted, such as a small Korean community or perhaps Vietnamese refugees who recently moved into our community. The IRS demand would force private schools to go on a continual safari for minorities in order to keep their tax exemption.

Racial nondiscrimination and racial balance are not the same. The IRS contradicts its own guidelines. But the future status of our private schools are held in the balances by these very conflicting statements.

Since the IRS contradicts itself, I recommend the guidelines be killed. If they are as inefficient in carrying out these guidelines as they were in drafting them, we are in serious trouble.

4. The principle of precedent:

The IRS has referred to various court cases affecting taxation of private schools. The IRS expressed a need for stronger and more forceful guidelines. If these guidelines are enforced, we will witness increasing stipulations until we are regulated to death. The principle of precedent is so strong that the IRS has shown that it doesn't know where to stop.

Based on what I heard at the December hearings and what I read in the revised guidelines, I simply and clearly do not trust the IRS. They told us in December that 'we are listening to you' and then they deliberately ignored our comments. The IRS has shown that they do not value our statements, especially the 80 percent who oppose their guidelines.

One example of precedence is the 20 percent of the minority percent in public school. No one at any time from the IRS has guaranteed that the percentage would never be raised. A spokesman for the NAACP Legal Defense and Education Fund called the 20 percent 'tokenism'. A spokesman for the American Civil Liberties Union said the percent should be revised upward. Will we be forced to come to Washington again, when the IRS moved upward to 30 percent, 50 percent, 75 percent? What would stop them from demanding equal percentage in private schools as in public schools? And after they have forced this percentage on the Christian School, will the Church be next?

5. Separation of church and state:

The IRS is guilty of overstepping the church-state issue in attempting to control the things that are of God and the Church. The Church-School is a positive and practical part of the ministry of the Church. They are one and the same and must remain so.

Those of us in Christian private schools believe that God has called us to train up our children in the nurture and admonition of the Lord. Our very reason for existence comes from the Bible. We are following orders from the Lord and we intend to carry out those orders, whatever the cost.

6. Unsettled conditios in the public schools:

Our public schools are in shambles. Test scores are down, morality is down but crime is up and the cost of this to the tax payer is astronomical. There is a battle raging in Prince Georges County, Md., between the recently elected County Executive Larry Hogan and the County School Board over expenses. The School Board has not gotten the message that reduction of taxes also includes the school budget.

We also have a battle in Prince Georges County between the local NAACP and the national NAACP over bussing and desegregation and the school board attorney. Does the Christian School wait until this is settled and the IRS decides whether or not our expansion is related to public school desegregation? According to the Washington Post, December 17, 1978, Prince Georges County had 25% black when school desegregation started in 1972 but now the percentage of blacks is 44%. If we have another desegregation plan, will our christian schools be 'reviewable' for several years because we have 'substantially' increased during that time?

The total public school population in Prince Georges County has decreased so much that some public school facilities are being closed. IRS revised guideline Sec. 3.03(b) 10 especially deals with using former public school facilities and public school desegregation. Would we be suspect because we might use former public-school facilities?

The biggest reason for the unsettled condition in the public school system is its philosophy of education, which is humanistic, evolutionary, man-centered and permissive, leaving the Lord out of education. The Christian school is God-centered and Christ honoring.

The public school seeks to impart information without regard for God. The Christian School seeks to: (1) lead the student to a salvation relationship with Jesus Christ, John 1:12, Rom. 10:9-10, 13; 2. endeavor to develop the student into a disciple of Jesus Christ, Rom. 8:29; 3. train the student in academic disciplines, such as math, science, history, languages, economy, government, as viewed from a Biblical perspective, Proverbs 1:7-8.

The IRS has gotten into the educational battle, which is none of its business. We will resist the IRS because they divert us from our primary task, that is, train our children in the fear of the Lord and the love of Jesus Christ.

7. Cost and financial considerations:

The Christian schools save the government as much as $30 billion annually, according to Dr. Tim LaHaye (Journal-Champion, Lynchburg, Va., April 6, 1979, page 2). They are training young people with quality education while saving the government billions of dollars annually. It costs the government over $1,000 per pupil per year in Prince Georges County, Md. We do not ask for your charity, but we want the IRS out of our business.

8. Conflict between IRS policy and private school guidelines:

The IRS is telling the private school how to run its school. We believe that if the IRS spent more time minding their business instead of OUR business, we all would benefit.

9. Support for S. 103: IRS may not implement certain proposed rules concerning private schools and discriminatory policies.

This Senate Bill is needed in order to stop the IRS. I strongly feel that the IRS is incompetent. Any bureau that could listen to as much testimony as the IRS did in December and then come out with such faulty concepts a few months later has clearly demonstrated that it is inept at facing and solving important matters.

10. Support for S. 449: Tax exemption and allowance of a deduction for contributions to such organizations shall not be construed as the provision of Federal assistance.

The issue is simply this: does everything belong to the government? Is everything not taken considered as assistance? What ever happened to the freedom to have and to hold private property? Instead of government OF the people, FOR the people, and BY the people, we have government OVER the people and IN the people's checkbooks.

We plead with you our beloved elected senators to hear our case. The IRS in recent months has proven to be hardened and insensitive to our position. We want you to support and pass S.103 and S.449 before more damage is done by the IRS. Please do not underestimate the depth and strength of our God-given convictions.

Thank you for hearing these views opposing the IRS and taxation of private schools.

Sincerely yours for freedom,

Rev. L. SAMUEL MARTZ.

GRACE MEMORIAL CHURCH,
Colmar Manor, Md., November 18, 1978.

Mr. JEROME KURTZ,
Commissioner, Internal Revenue Service,
Washington, D.C.

DEAR COMMISSIONER KURTZ: I request permission to speak at the public hearing scheduled for Dec. 5, 1978 concerning the Proposed Revenue Procedure on private tax-exempt schools. I wrote to you on Oct. 18, 1978, voicing my strong opposition to this proposal. Therefore, I believe that I qualify according to the rules published in the Federal Register, Oct. 18, 1978.

I plan to use all 10 minutes alloted to me, covering my list of points. Here is the outline and contents of the remarks I plan to make.

Thank you for allowing me this opportunity to voice my opposition to the IRS Proposed Revenue Procedure on Private Tax-Exempt Schools (Federal Register, Aug. 22, 1978, Vol. 43, Nov. 163, page 37296). The following are my reasons for opposing this suggested plan.

1. The 1978 resolution passed by the Independent Fundamental Churches of America at its annual convention:

Resolution on christian schools:

Whereas, the Word of God teaches that the home is the basic unit of society, and that God has entrusted to parents the responsibility for the education of their children (Deut. 6:6, 7; Eph. 6:4); and

Whereas, state controlled education has become increasingly humanistic and otherwise contrary to a Scriptural philosophy of life; and

Whereas, the Christian school movement seeks to restore the cooperation between the church and the home in education as was the pattern at the time of the founding of our country; be it therefore

Resolved, That the Independent Fundamental Churches of America, meeting at its 49th annual convention in Estes Park, Colorado, June 24–30, 1978, urge its constituency to support, by whatever means and abilities God has given them, the Christian school movement in its effort to establish a biblical base of education; and be it finally

Resolved, That we strongly protest the encroachment upon this movement by government agencies which seek to hinder and unnecessarily control its ministry.

2. Separation of church and state:

Matt. 22:21 says, "Render, therefore, unto Caesar the things which are Caesar's; and unto God, the things that are God's." The IRS is guilty of overstepping its boundaries in attempting to control the things that are of God. Government is permitted to collect taxes to cover the expenses of providing services for its citizens. The IRS has failed to prove how they are going to improve government services by taxing private Christian schools.

3. Clash between public schools and private, christian schools:

The IRS has gotten into the educational battle between public government schools and private, Christian schools. There are basic differences between these two groups.

a. Basic philosophy of education: Public-humanistic, evolutionary, man-centered, permissiveness Christian-Biblical, God-centered.

b. Basic purpose: Public-impart information, without religious slant Christian—(1) Seek to lead the student to a salvation relationship with Jesus Christ, (John 1:12, Rom. 10:9–10, 13); (2) Endeavor to develop the student into a disciple of Jesus Christ, (Rom. 8:29—to be conformed to the image of His Son Jesus Christ); (3) Train the student in academic disciplines, such as math, science, history, languages, etc., as viewed from a Biblical perspective.

4. Costs and financial considerations:

a. Private Christian School students save the government as much as $1,000 per student per year in appropriations to the local school budget (Example: Prince Georges County, Md.)

b. If the IRS ruling unfairly disqualified a school, tuition would be raised, as much as 30 percent.

c. The private Christian schools are providing a valuable service to the nation. They are training young people with quality education, while at the same time saving the government millions of dollars annually.

5. Conflict between IRS nondiscriminatory policy guidelines (sec.4 guidelines, 4.03—operation in good faith on a racially nondiscriminatory basis) and guidelines of private, christian schools.

1. Scholarship or financial assistance: Most private schools do not have scholarships because of school financial policies. To be consistent with sec. 3.01, scholarships, if made available, should be granted to "any race." This means that the scholarships should be awarded on the basis of scholastic ability and not based on race.

2. Recruitment programs: Most Christian schools do not actively recruit any race. Most Christian schools build their reputatión through superior education and therefore do not need a vigorous recruitment program.

3. Increasing percent of minority: This infers a decrease in majority students, calling attention to racism and becomes reverse racial discrimination.

4. Employment of minority teachers, staff: Most private Christian schools have high standards of education, strict fundamental doctrinal beliefs and high standards of morality for their staff, regardless of race. Hiring is based on these criteria and not on race.

5. Combination of lesser activities: Most private Christian schools are already busy with a multitude of extra-curricular, after school activities, such as sports leagues, fine-arts contests, etc.

6. Contradictions and inconsistencies in the IRS proposal:

a. Proposing a set of regulations for two entirely different classes of private schools (IRS Supplementary information).

(1) Those which have been held by a court or agency to be racially discriminatory;

(2) Those which have an insignificant number of minorities and started to expand at about the time of desegregation of public schools.

These two catagories are not the same. Class 1 has been proven guilty. Class 2 has not been PROVEN guilty but the IRS has INFERRED guilt unless their suggested guidelines are adopted.

b. Racial nondiscrimination vs. racial balance: Sec. 3.01 demands that a school be open to ALL RACES without discrimination while Sec. 3.03 requires a certain racial balance. There is a difference between racial balance and nondiscrimination.

Sec. 3.01 defines racial nondiscrimination as ANY race while Sec. 4.03 demands evidence for nondiscrimination by certain criteria directed at minority students. Therefore, the nondiscrimination of 3.01 applies to ANY race but the nondiscrimination of 4.03 means minority students.

For these reasons I sincerely request that the IRS should NOT adopt the "Proposed Revenue Procedure on Private Tax-Exempt Schools." Thank you.

Sincerely yours,

Rev. L. Samuel Martz.

Grace Memorial Church,
Colmar Manor, Md., April 17, 1979.

Mr. Jerome Kurtz,
Commissioner, Internal Revenue Service,
Washington, D.C.

Dear Commissioner Kurtz: I am writing to voice my strong opposition to the revised revenue procedure concerning taxation of private schools as detailed in news release IR-2091.

I find it incredible and appalling that you have permitted the revised guidelines to be virtually the same as the original ones published last Aug. 22, 1978 in the Federal Register. The news release said that after considering public comments, you have issued these guidelines. I personally listened to the testimony of 116 people, with 100 speaking in opposition to the guidelines. It is hard to believe that you "considered public comment".

Because I was a newspaper reporter before becoming a minister and because I have strong feelings about this issue, I took notes on all of the 116 witnesses who spoke. Your revised guidelines are not supported by the vast majority of those who testified in December, especially the classification of "reviewable" schools. Many witnesses said that the IRS violated the principle of 'innocent until proven guilty.'

A number of speakers at the December hearings questioned whether you and your panel were really listening or whether you were simply going through the motions. Your revised guidelines indicate that my worst fears are being realized, that you are determined to get the guidelines enacted and did not really listen to the speakers at last December's hearings. I heard what they said and I have studied the revised guidelines and you simply and plainly have not incorporated the strong opinions expressed at the hearings.

You heard the Senators and Representatives from Congress and what they said. It seems that you are defying congress with your revised guidelines. It is my strong recommendation, which I will make before the U.S. Senate Subcommittee on Taxation and Debt Management on April 27, that the IRS be forbidden to implement these guidelines. I believe the IRS is insensitive to the vast majority of private schools and really did not listen to the testimony at its December, 1978 hearings.

The area of "reviewable" schools should be dropped in its entirety. The business of the IRS is to collect taxes, not review schools. You are moving into constitutional areas, such as separation of church and state, innocent until proven guilty, legality of quotas.

Using the revised guidelines, the only time that IRS should enter a case is after "final agency action" has been taken, meaning no further administrative or judicial appeal can be taken. (revised guidelines 3.02). It is my belief that the IRS would be better off dealing only with "adjudicated" schools and dealing thoroughly with those schools, than to attempt to force these revised guidelines and causing great opposition.

Your revised guidelines are little different from the original ones. You will be forced to continually defend yourself, being less effective in your other areas of responsibility.

My letter to you on November 18, 1978, outlined my opposition to the IRS proposal. Since your revised guidelines are essentially the same as the original, my opposition remains the same: 1. 1978 resolution passed by the independent fundamental churches of America at its annual convention; 2. Separation of church and state; 3. Clash between public schools and private, christian schools; 4. Costs and financial considerations; 5. Conflict between IRS nondiscriminatory policy guidelines and guidelines of private, christian schools; 6. Contradictions and inconsistencies in the IRS proposal.

I represent the Independent Fundamental Churches of America, an organization of about 1400 ministers and 1000 churches. We object to government agencies which seek to hinder and unnecessarily control the ministry of the churches.

The IRS is a good example of bureaucracy. You had a great opportunity to restore faith in the American government. I sat through hours of testimony, as well as your panel, but the revision did not reflect the testimony of most of the witnesses.

Your meeting with CAPE was a farce. They do not represent the vast majority of private Christian education. If you were really sincere, you would have met with those of us who came to Washington at our expense to present the views of our people. You have all of our addresses. You could have invited all of us to study the revised guidelines before you published them. There is one reason why you did not, you know that most of us are just as strongly opposed to the revised guidelines. I can assure you that you will be hearing from many of us until this nonsensical and preposterous bureaucratic edict is killed.

Thank you for hearing my strong opposition to the revised guidelines on taxation of private, christian schools.

Sincerely yours,

Rev. L. SAMUEL MARTZ.

STATEMENT OF REV. JIM NICHOLLS, ON BEHALF OF DR. CARL MCINTIRE, PRESIDENT, INTERNATIONAL COUNCIL OF CHRISTIAN CHURCHES

Dr. Carl McIntire is presently conducting a Bible Seminar in the Holy Land and thus is unable to be here. He has asked that I prepare remarks and appear in his behalf today.

Dr. McIntire would like to have appeared before you in a dual capacity:

First, as Pastor of the Bible Presbyterian Church of Collingswood, New Jersey, a church of 1,800 members which he has served for 45 years.

Secondly, as the President of the International Council of Christian Churches, organized in 1948 and consisting today of more than 275 Protestant denominations throughout the world.

Dr. McIntire did appear before the House Subcommittee of the Ways and Means Committee on February 22, 1979. I have a copy of his statement with me which I will present to the Chairman and also a copy for the reporter. I would request that his remarks and subsequent answers to that Committee be inserted into the records of this Committee, as I am sure they will prove helpful.

Let me preface my remarks by informing this Committee that I have attended the Oral Hearings conducted by the Internal Revenue Service in December of 1978, and also most of the Hearings before the House Subcommittee of the Ways and Means Committee held earlier this year.

I have several observations that might prove helpful to this Committee.

PHENOMENON DEFINED

During the past few years, all across our country we have witnessed a phenomenon. Many people do not understand what has happened or why. This phenomenon is the coming into being of multiplied thousands of Christian Schools operated mainly by Bible-believing, fundamental churches. To make this even more of a mystery, these thousands of Christian schools have been started during a time when many of the old parochial and private schools have, for various reasons, closed down. One organization, in assessing this revival of the Christian schools stated that "a new Christian school opens in America every seven hours". (Attachment 1.) Most of us are no doubt aware of the fact that up until approximately one hundred years ago, just about every school that was scattered throughout our country was church operated and their major text book was the Bible. For various reasons, public schools came into being, and, outside of some of the parochial schools being carried on, the church stepped out of its ministry and obligation of educating children.

WHY?

This revival of the Christian schools has mystified a lot of people, and they ask why? The answer to this is actually very simple. Parents everywhere, and especially Bible-believing parents, have become greatly concerned at the end product that our public schools have produced. Children had become rebellious, adopted wrong attitudes that resulted in a myriad of other problems, i.e. vandalism, classroom violence, drugs, wrong influences, sexual misconduct, etc., resulting in a decreasing of academic excellence. It seemed that beliefs and life styles were being altered. Too many of our young people were becoming drop-outs. This caused Bible-believing Christian parents, who accepted the Ten Commandments as their moral code, to re-examine what we were doing. In turn, thousands of Bible-believing churches were forced to make certain decisions.

The end-product of our schools speak for themselves.

Our children's main problems stem from what they are being taught in public schools.

You cannot put God out of our schools and produce the calibre of student needed to continue America's great heritage.

The Bible and faith in God is the bedrock of our beliefs.

The child is in school during the formative period of life and the school is the principal influence.

It should be remembered that in the year 1975, the public school had become such a "blackboard jungle" that the Senate Judiciary Committee established a subcommittee to investigate the widespread havoc. One of the most liberal of all Senators, Birch Bayh, headed this subcommittee. Here is a surprising thing! Even Senator Bayh was forced to report "an alarming number of homicides, rapes, robberies, and assaults on both teachers and students". The subcommittee did not investigate the academic side of the question, which was even worse.

WHOSE RESPONSIBILITY?

Dr. McIntire, in his testimony before the House Subcommittee stated: "The reason Christian people and Christian churches want religious schools which they build and support is that they are carrying out the teaching of the Bible. When God gave to Moses the Ten Commandments, as recorded in Deuteronomy Chapter Six, He told Moses: "And thou shalt teach them diligently unto thy children. . . . And thou shalt do that which is right and good . . ." (Deut. 6:7; 6:18.) Repeatedly, Moses was commanded, "Thou shalt teach them:. Solomon, the wisest man who ever lived, said, "Train up a child in the way he should go, and when he is old, he will not depart from it". (Prov. 22:6.) Paul, the Apostle, told young Timothy "From a child thou hast known the holy scriptures, which are able to make thee wise unto salvation." (2 Tim. 3:15.) Bible-believing churches all across the nation are accepting their God-given responsibility and thus have, or are, starting schools.

WHAT IS A CHRISTIAN SCHOOL?

Most of the Christian schools across our nation could be defined in the findings of the United States District Court for the District of South Carolina in the *Bob Jones University* v. *United States of America*, and I quote: "In attempting to accomplish its purpose of training Christian leadership, the plaintiff (Bob Jones University) follows the teaching of the Bible in every instance where literature or philosophy vary from the 'Word of God' as set forth in the Bible. This is done so that a student can learn to distinguish between that which is of God and that which is of an "Anti-God" mind and combat the latter. . . . Every teacher, no matter what are his academic credentials, is required to be a "born again" Christian, who must testify to at least one saving experience with Jesus Christ, and who must consider his mission at plaintiff to be the training of Christian character. Any instructor who fails to believe in or carry out the essentials of plaintiffs preamble, is dismissed . . . Religion reigns, molding every action, policy and decision of plaintiff. Plaintiffs (Bob Jones University) Biblical beliefs permeate every facet of the institution . . . religion controls and dominates education . . . The court finds that plaintiff's primary purpose is religious and that it exists as a religious organization. The institution also serves educational purposes."

A CHALLENGE!

We are told that competition is the spice of life, and is a good and wholesome thing. Gentlemen, here's a challenge! Compare the end result of our public schools with that of the Christian schools Upon an honest and realistic investigation, you will find that the Christian schools surpass the public schools by providing better education at a fraction of the cost of our public schools. You will also find that there is almost a total lack of violence, better discipline, little if any crime, and moral and drug problems almost non-existant, in short, a better and more wholesome climate for learning.

THREATENED!

These church schools, which produce a superior education and build honest, decent, law-abiding citizens of high moral standing are being threatened by government intrusion by means of the Internal Revenue Service's Proposed Rules and Regulations. The Revised proposals are believed by some to be even more deadly than the original proposals, because they are couched in more refined and sophisticated terms, making them even harder to define.

THE SOURCE OF THE PROBLEM

During the latter part of 1978, I conducted two extensive interviews with certain officials at the Internal Revenue Service. As a result, I learned that the reason they brought out their proposed Rules and Regulations was because of pressure put upon them by the Civil Rights Division of the Department of Justice. This would lead me to believe that the real issue here is being cleverly disguised and that the proposed Rules and Regulations by the Internal Revenue Service are only a smoke screen to cover the attempt by government to gain control of these Christian Schools in a manner contrary to our Constitution. I believe it behooves this Committee to recomend to the appropriate Congressional Committee that they investigate the involvement of the Civil Rights Division of the Department of Justice in this matter.

THE REAL TARGET

While Mr. Kurtz of the Internal Revenue Service has stated on more than one occasion that he refuses to recognize "Christian" schools and that these Rules and Regulations apply only to "private" schools, may I point out: When stripped of the various exemptions, i.e. Hebrew, Amish, Lutheran and Catholic schools, these proposals obviously zero in on the Bible-believing fundamental schools. In reality then, it must be concluded that the issue here is nothing more than an attack on these Bible-believing fundamental church schools. There is no question, in the light of material which has come across my desk, that there is a definite assault on Christian and private schools by various State and Federal agencies. Should you be interested in further material on this aspect, I would be most happy to supply it to you.

WHY WE OPPOSE THE IRS PLANS

1. The Internal Revenue Service (the State) has entered into an area expressly forbidden by our Constitution in the First Amendment and has actually tried to "make laws which relate to the establishment of religion" and that could "prevent the free exercise thereof". This kind of action, according to Title 18 U.S.C. Section 241, 242 is a criminal act, and as such bears a heavy fine and imprisonment.

2. The Internal Revenue Service has usurped authority that our Constitution limits only to Congress, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" (Article I, Section I, U.S. Constitution). In the past, we have had a weak Congress that has allowed many government agencies to run roughshod over our freedoms and Constitutional Rights. Congress must live up to its oath to support and uphold our Constitution, or face the consequences which would be bound to ensue. Congress must not allow the Internal Revenue Service to "legislate" under the guise of "rule making"!

3. The Internal Revenue Service has stooped so low as to raise the ugly head of "racism" as an excuse to enter into this forbidden area. In the past, this subtle technique has been most effective, for no one wants to be branded as a racist. It must be pointed out that racism is not really the issue here. If it were, then other methods would be used. It follows then that the Internal Revenue Service has failed to prove its case, and thus must use "race" as a means to accomplish an end prohibited by our Constitution.

4. Congress has passed a Public Law Title 26 U.S.C. Section 508(c), which grants a "mandatory exception" to "churches, their integrated auxiliaries and conventions or association of churches". There is no way that the Internal Revenue Service can take away tax exemption unless Congress first repeals this section. Even if Congress should repeal this, they would still be faced with the clear dictates of the First Amendment.

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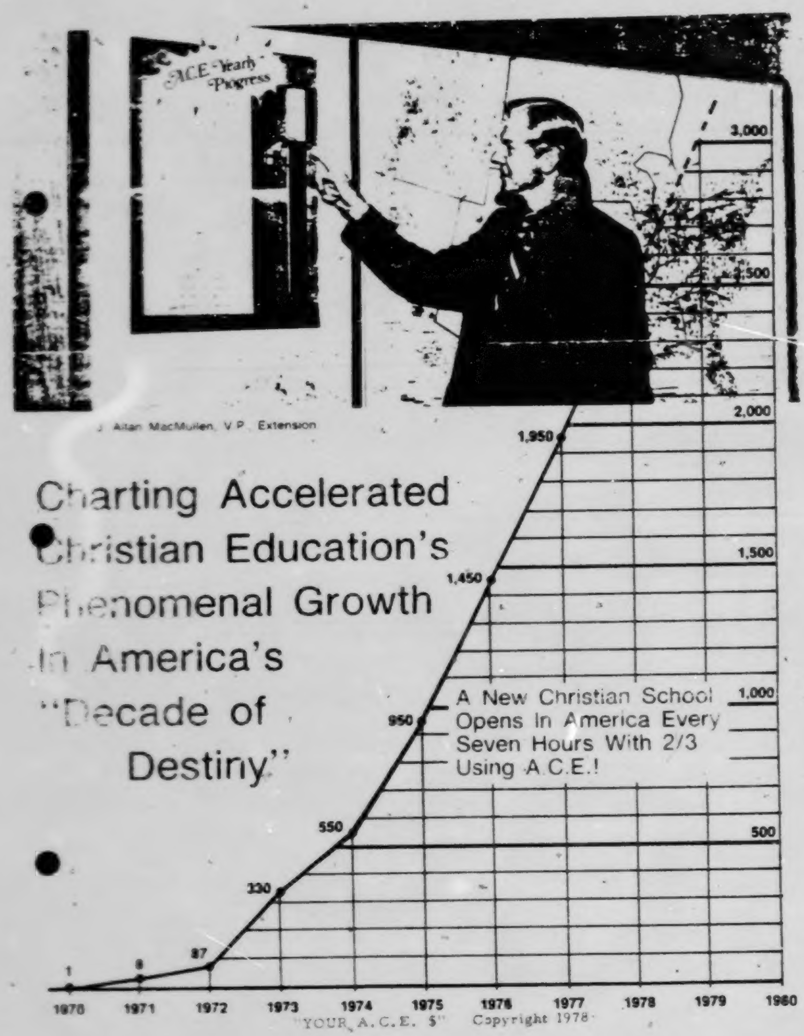
CONCLUSION

Gentlemen, I have by no means exhausted my subject, but I have exhausted my time, and I must close. In the light of the information which I have brought to your attention, you must realize that the Internal Revenue Service has no Constitutional authority for their attempt to regiment and control our Christian church schools. I believe, Mr. Chairman, that you, and the other members of this Subcommittee, meant it when you took your oath of office "to support and uphold the Constitution", and I urge you to do the only thing which you can do Constitutionally and deny the Internal Revenue Service's attempted power grab, by prohibiting them to enact their proposed Rules and Regulations. Such action would allow Christian schools, with their Bible standards of morality, and high scholastic record, to continue unimpeded by government control or tyranny.

"Righteousness exalteth a nation, but sin is a reproach to any people". (Proverbs 14:34.)

Thank you.



J. Allan MacMullen, V.P., Extension

Charting Accelerated Christian Education's Phenomenal Growth In America's "Decade of Destiny"

A New Christian School Opens In America Every Seven Hours With 2/3 Using A.C.E.!

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Testimony of James E. Wood, Jr., Executive Director, Baptist Joint Committee on Public Affairs

I am James E. Wood, Jr., Executive Director of the Baptist Joint Committee on Public Affairs.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 27 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual Baptist churches, we do not purport to speak for all Baptists.

On August 22, 1978 the Internal Revenue Service published, at 43 Fed. Reg. 37296, a proposed revenue procedure providing for the loss of tax-exempt § 501(c)(3) status of private elementary and secondary schools which did not enroll a rigid quota of minority students or which were not able to prove the negative that they were not discriminating in admissions or enrollment. This proposed revenue procedure elicited the heaviest response the Internal Revenue Service has ever had to one of its proposals. The overwhelming majority of that response was negative. The Service then decided to hold public hearings, 43 Fed. Reg. 48091 (1978). Because of public demand the hearings were extended from one day to one week. The testimony, for the most part, objected to the proposed revenue procedure. On February 13, 1979 a revised proposed revenue procedure was published at 44 Fed. Reg. 9451.

These two publications have been the catalyst which caused S. 103 and S. 449 to be introduced and caused companion bills to be introduced in the House of Representatives.

Baptists generally are not aware of specific bill numbers, but the Baptist Joint Committee on Public Affairs has stated its opposition to these two proposed revenue procedures and Baptist churches and agencies have repeatedly voiced opposition to similar types of governmental action and to these two procedures specifically. Our testimony will be directed to our opposition to the proposed revenue procedure and, therefore, indirectly to the support of the thrust of S. 103 and S. 449.

The Baptist Joint Committee has a long-standing commitment to the protection of human rights and to the elimination of discrimination based on race, religion, national origin, sex, or age. Thus the possibility that a church-related or church-operated school would discriminate in its enrollment policy is patently offensive to the formal position of the Baptist Joint Committee. Yet we were compelled to object to the proposed revenue procedure published in the Federal Register on August 22, 1978 (43 Fed. Reg. 37296) and must also object to the revised proposed revenue procedure published in the Federal Register on February 13, 1979 (44 Fed. Reg. 9451). The bases of our objections to the revised proposed procedure are specified below. Thus we urge that this Subcommittee report out a bill which will unequivocally declare congressional policy in favor of separation of church and state and in opposition to the Internal Revenue Service's interpretation of congressional intent in the revised proposed revenue procedure on "certain private schools" as it applies to church-related, church-operated schools.

BASES OF OPPOSITION

The revised proposed revenue procedure states that its purpose is to set forth guidelines for determining whether "certain private schools" have racially discriminatory enrollment policies and, therefore, are not qualified for tax exemption under § 501(c)(3) of the Internal Revenue Code of 1954. Included in the class of "certain private schools" are "church-related and church-operated schools." In these hearings, the Baptist Joint Committee on Public Affairs will limit its statemnent to the questions which the revised proposed revenue procedure raises for churches and church-related and church-operated institutions. This will be done because, in our view, the fundamental issue which is raised by the revised proposed revenue procedure is religious liberty and the separation of church and state rather than the furtherance of an altogether meritorious public policy of abolishing racial discrimination. In taking this approach it is our contention that Congress and the Internal Revenue Service are dealing with a broader issue than tax exemption under § 501(c)(3) of the Internal Revenue Code of 1954. The First Amendment places the § 501(c)(3) religious organizations in a unique position. We believe that the Internal

Revenue Service lacks not only statutory authorization for issuing this proposed procedure but also the legal competence, under the First Amendment, to regulate enrollment policies of either churches or the schools which they operate as an integral part of their religious mission.

There can be no question but that the religion clauses of the First Amendment preclude the state from establishing any criteria for who may be enrolled as a member of a church. It is not foreseeable that a governmental unit would even contemplate saying to a church, "In order to maintain your § 501(c)(3) tax-exempt status you must enroll in your membership a number of blacks equal to 20 percent of the percentage of blacks in the community served by this church." The First Amendment would prohibit such an action. It is almost an identical action for a governmental unit to tell a school which was established as an integral part of a church's religious mission that the state is empowered to set standards for enrollment in that school and that failure to meet those enrollment standards would put its tax-exempt status at risk. This cannot be done under the First Amendment either. Efforts to make such rulings are, in effect, efforts to draw legal distinctions between a church and what it declares is a part of its religious mission. Such distinctions put the state in the position of unconstitutionally involving itself in the religious doctrines of the church [see, *United States* v. *Ballard*, 322 U.S. 78 (1944); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969)].

The reasons why churches begin and maintain schools are varied. As a result of the Supreme Court's decisions in *Engel* v. *Vitale*, 370 U.S. 421 (1962), and *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), many people honestly believed that the public schools were being taken over by what they called "secular humanism." Some private schools were begun by churches to make sure that their members' children had a proper religious education. It should be noted that this was the period of time in which the courts were ordering desegregation of the public schools in those regions of the country most concerned over "secular humanism" in the public schools. There are no doubt some church-related, church-operated schools which discriminate on the basis of race in their enrollment practices. Some of these may discriminate as a result of a strongly held religious belief which is directly related to their church membership policy. These schools' admission policies may be reprehensible to many outside these religious communities, but an attempt by government to control those policies by a threat to revoke the § 501(c)(3) status of these schools and/or to police their day-to-day admissions and enrollment practices constitutes a flagrant violation of the guarantees of the religion clauses of the First Amendment.

The independent nonpublic school which claims to be Christian or Black Muslim or Jewish but which is not an integral part of a church, mosque, or synagogue and its religious mission may be an entirely different issue. However, this is not a problem which we need to address.

Over the past two decades the Supreme Court has consistently held that parochial schools are religious—i.e. they were established for religious purposes, their curriculum is permeated with religion, and they are considered a part of the religious mission of the church. We agree completely. The Court, in *Lemon* v. *Kurtzman*, 403 U.S. 602 at 612-613 (1971), spoke of the constitutional limitations on statutes—and, obviously, on administrative regulations—which relate to religion:

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion'." (citations omitted).

Granting the secular purpose of this revised proposed revenue procedure, the primary effect test is not met. The threat of losing a statutory grant if a constitutional right is acted upon is manifestly chilling and, therefore, has the effect of substantially inhibiting the churches in carrying out what they conceive to be their religious mission.

Further, if the revised proposed revenue procedure becomes the policy of the Internal Revenue Service, a process would be set in motion which would, unconstitutionally, excessively entangle government with religion. Intricate systems for determining whether or not a church-related, church-operated school is in compliance with the procedure are spelled out. The conditions which are established could not be met on a "one time only" basis. The very nature of the revised proposed revenue procedure would necessitate an ongoing examination of records and activities. Any logical and/or legal definition of "excessive entanglement" would clearly comprehend this kind of oversight and supervision.

In attempting to draw up rules which affect churches as a class, government is caught on the horns of a dilemma. If it issues rules which make discriminations between organizational forms of churches—e.g. between hierarchical and congregational churches—it runs afoul of the evenhandedness which the establishment clause of the First Amendment requires [see, *United States* v. *Carson*, 282 F.Supp. 261 (D.C.Ark. 1968)]. If, on the other hand, the Internal Revenue Service fails to make these discriminations in rules it issues and therein considers all church organizational forms as if they were identical units in a broad class, those rules produce an unconstitutional preferential treatment [see, *Everson* v. *Board of Education*, 330 U.S. 1 at 15–16 (1947)] and are further flawed by their failure to secure the equality of the law demanded by the due process of law clause of the Fifth Amendment [see, *Truax* v. *Corrigan*, 257 U.S. 312 at 332 (1921); see also, *Steward Machine Co.* v. *Davis*, 301 U.S. 548 at 585 (1937) and *Hirabayashi* v. *United States*, 320 U.S. 81 at 100 (1943)].

In the revised proposed revenue procedure the Internal Revenue Service has put itself in the constitutionally treacherous position of making discriminations between churches on the basis of organizational forms and thereby making accommodations favorable to one class of religious organizations as opposed to the others. For example, § 3.03(b) and § 3.03(c)(6) essentially exempt schools such as the Hebrew Day Schools, Black Muslim schools, and Amish schools from compliance. Section 3.03(b) also makes accommodation with the Roman Catholic schools when it states: "If a particular school which is part of a system of commonly supervised schools would be treated as not having significant minority student enrollment . . . it may nevertheless be considered to have a significant minority student enrollment if [among other things], taking into account all schools operated by the system within the community, the school system, in the aggregate, has significant minority student enrollment." With very few exceptions only the Roman Catholic Church operates a school system. Most of the other church-related, church-operated schools are simply local church schools and not a part of a system. This provision of § 3.03(b) means that a denomination which operates a system of schools in a community may have some schools which are predominately of the majority race and some which are almost entirely composed of a minority race enrollment without placing their tax-exempt status at risk as long as there is a balance "in the aggregate." There can be no "in the aggregate" for the vast majority of Protestant schools which are owned, operated, and maintained by a local congregation.

The First Amendment very clearly proscribes such invidious distinctions between church organizational forms. It would appear that the only logical response of government would be to cease attempting to regulate bona fide churches and those agencies which they have established as integral to their religious mission.

The Supreme Court in a recent decision held that the Constitution also proscribes the use of racial quotas in determining who will be enrolled in a school—and the Internal Revenue Service is, in effect, forcing such quotas as the price guaranteeing that a school's tax-exempt status will not be reviewed under the revised proposed revenue procedure. In dealing with an attempt to assure a specified percentage of minority students in a public institution the Supreme Court held, "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake" [*Regents of the University of California* v. *Bakke*, —— *U.S.* ——, *98 S.Ct. 2733 at 2757 (1978)*]. *Thus, the Court declared that a racial quota system in a secular, state-operated school was unconstitutional on the basis of the Fifth and Fourteenth Amendments. The criteria on racial enrollments in church-related, church-operated schools which the Service seeks to establish share the unconstitutional features of Bakke.* The religion clauses add an extra dimension of unconstitutionality.

CONCLUSIONS

The legislative history of the inclusion of the restraints on political activity of § 501(c)(3) organizations and the judicial interpretations of that section clearly show that Congress intended to limit only the political activities of those groups which are tax-exempt and whose contributors can claim a tax deduction under § 170 of the Code. The use of § 501(c)(3) to curb activities other than political is clearly contrary to the intent of the statute. The Internal Revenue Service, in instituting the revenue procedure under discussion today, clearly entered the lawmaking field and, therefore, unconstitutionally usurped the legislative role of the Congress. As the Supreme Court pointed out in *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129 at 134 (1936):

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Congress, in setting up the qualifications for tax exemption under § 501(c)(3), used plain, unambiguous language. The Internal Revenue Service has seen fit to attempt to legislate public policy rather than remain within the language of the Code. In a December, 1978 decision of a case where the facts are almost identical to those which would be raised in court challenges if the proposed revenue procedure becomes the final procedure, the federal District Court for South Carolina held that the revocation of the tax-exempt status of Bob Jones University was improper. The court, in *Bob Jones University* v. *United States*, —— F.Supp. —— (D.C.S.C. 1978), Civil Action No. 76-775, stated that, "Although plaintiff [Bob Jones University] satisfies the written requirements of § 501(c)(3), defendant [the Internal Revenue Service] has revoked its exemption. Thus, the IRS in this case and in its policy pronouncements, as exemplified by Rev. Rul. 71-447, has enacted in substance and effect a change in the law." We contend that the Internal Revenue Service is attempting to achieve the identical end in the proposed revenue procedure and that, just as the court held in *Bob Jones University*, in so doing it is infringing Congress' prerogative and First Amendment religious rights of the churches.

Because we believe that the Constitution requires that churches and their agencies which are integral to their religious mission be excluded from coverage by revenue procedures such as the one dealing with nonpublic schools, we are today supporting the thrust of S. 103 and S. 449.

It is our hope that Congress will pass an act which will clearly spell out congressional intent involved in § 501(c)(3) prior to the expiration of the December 31, 1980 moratorium provided for in S. 103.

S. 449, by declaring that tax exemption and tax deductibility of contributions "shall not be construed as the provision of Federal assistance," fills a decided need. It could stop overzealous federal regulators who want to legislate public policy by removing a basic rationale for regulation.

This nation was built on the principle of a free church within a free state and that principle, explicitly established in the First Amendment, must be perpetuated. I have confidence that this Subcommittee will agree with us on this matter.

COMMENTS OF BRIARCREST BAPTIST SCHOOL SYSTEMS, INC.

The Briarcrest Baptist School System, Inc. ("Briarcrest") of Memphis, Tennessee, objects to the revised, proposed Revenue Procedure as arbitrary, discriminatory and unlawful. The proposal could result in the loss of tax exempt status by a school without any evidence whatsoever of any discriminatory conduct by the school and despite a completely open nondiscriminatory policy on the part of the school.

THE CRITERIA FOR DETERMINING "REVIEWABLE SCHOOLS" ARE ARBITRARY

Is is abundantly clear that a school which is deemed "reviewable" under the proposed Procedure is presumed to be guilty of racial discrimination, unless it successfully carries the burden of proving its innocence.

Under the proposed Procedure, a school will be deemed "reviewable" if it was:

1. "[F]ormed or substantially expanded at the time of public school desegregation in the community served by the school;" and
2. "[D]oes not have significant minority enrollment".

The new proposal purports to add a third criterion—that the creation or expansion is related, in fact, to public school desegregation. (Paragraph 3.03.) However, Subsection (c) makes it clear that this third element is, in fact, meaningless. Subsection (c) states:

"Ordinarily, the formation or substantial expansion of a school at the time of public school desegregation in the community *will be considered to be related in fact to public school desegregation.*" (Emphasis added.)

Therefore, the existence of the first two elements are sufficient, in and of themselves, to establish a presumption of guilt. The third element does not remove the presumption, it merely lists some circumstances which, if proved by the school, might meet the presumption. The burden remains on the school to prove its innocence.

The Justice Department has cogently and persuasively argued to the United States District Court for the District of Columbia that these very criteria cannot lawfully support the presumption to which the Procedure gives rise. The Justice Department, in *Wright* v. *Blumenthal*, Civil Action No. 76-1426 (D.D.C.) states:

". . . given a total absence of allegations of specific discriminatory conduct, the schools' continued insubstantial minority enrollments could plausibly be accounted for on many grounds other than intent to discriminate. For example, it could be accounted for by reason of an absence of minority applications due to the schools' relatively high tuition; the schools' inability to offer specific programs available in public schools; their inconvenient geographic location; local residential patterns; or the schools' being perceived by minorities on subjective grounds as potentially threatening educational environments. *In view of these and other plausible grounds for explaining the schools' continued insubstantial minority enrollments, it is extremely doubtful whether plaintiffs' per se presumption that the schools are discriminatory could be sustained as lawful absent proof of specific discriminatory conduct.*

• • • • • • •

"Similarly, plaintiffs' proposed guidelines denying exemptions to "suspect" schools established or expanded at a time of desegregation is also subject to grave legal challenge. For it is apparent that many factors other than an intent to discriminate might account for a given schools' establishment or expansion at a time of desegregation—for example, an already existent general dissatisfaction with the quality of public education; an availability of funds for private school expansion; a need for such expansion because of community growth."

Reply of Defendants to Plaintiffs' Opposition to Defendant's Motion to Dismiss, pp. 11-12, 14, *Wright* v. *Blumenthal*, Civil Action No. 76-1426 (D.D.C.) (Hereinafter referred to as "Reply").

The definition of nondiscriminatory policy, as set forth in the proposed Procedure, relates exclusively to the policies, programs and actions of the school—not to its history or its acceptability to the minority population of its community. (Sec. 3.01). The proposed presumption of guilt relates exclusively to the latter two elements, and is totally unrelated to the actual present practices, policies and actions of the school. The presumption is, therefore, arbitrary and unlawful.

THE PROPOSED REVENUE PROCEDURE EXCEEDS THE AUTHORITY OF THE IRS

The only Internal Revenue Code section involved in this case is Section 501(c)(3) which grants tax exemptions to "corporations . . . organized and operating exclusively for religious . . . or educational purposes. . . ." The Code makes no reference to the social policies of the corporation entitled to the exemption.

The United States District Court for the District of South Carolina in *Bob Jones* v. *United States*, Civil Action No. 76-775 (D.S.C. December 26, 1978) pointed out that the Supreme Court in *Commissioner* v. *Tellier*, 383 U.S. 687 (1966) admonished the Commissioner of Internal Revenue: "not to use the tax laws as a means of enforcing other laws and public policy if the revenue statute makes no mention of such conduct or if there does not exist a tight nexus between the tax benefit and the alleged unlawful conduct."

Bob Jones, Page 24, Slip Opinion, held that even the existing Revenue Rulings and Procedures 71-447, 72-54, 75-50 and 75-231 "constitute a use by the IRS of the federal tax law as a sanction for what it considers a wrongdoing, or its idea of proper social conduct of persons of different races, uses of the Code prohibited by the Supreme Court." Id.

The Court went on to point out that "the court is concerned by the many dangers inherent in defendant's interpretation that exemptions may be revoked for violations of federal public policy. Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. . . . Our laws would change at the whim of some nonelected IRS personnel producing bureaucratic tyranny." Id. at 25.

The above statements of law cast grave doubt upon the soundness of the decision in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), which forms the principal basis for the Internal Revenue Service position. However, the proposed Procedure goes far beyond even the principle of *Green* v. *Connally* and includes principles expressly rejected in that case.

In *Green* v. *Connally*, the "badge of doubt" status assigned to Mississippi schools was arrived at on the basis of a record which convinced the Court that there was a widespread conspiracy throughout the State to thwart integrated public school education. This factual basis for the "badge of doubt" concept in the *Green* case is totally lacking in most other areas of the country.

However, even in *Green*, the court held that: "exemptions and deductions would be denied . . . on account of *acts and practices constituting discrimination* against students on account of race . . . if schools sincerely terminate those harmful activities, they may obtain the exemption." Id. at 1166.

Even more to the point, the *Green* court said: "it is not remotely suggested by intervenors [parents of children enrolled in white private schools] that they fear lest their schools will undertake only activities that are innocent, i.e., not racially discriminatory, yet be wrongly condemned as discriminatory." Id. at 1166–67.

The proposed Procedures would deny exemptions and deductions without any evidence whatsoever "of acts and practices constituting discrimination." Under these proposals, exemption is denied on the ground of something which may have happened 10 or 20 years ago—the inception of the school—and on the ground of the refusal of the black community to accept the schools' invitation to students to enroll. It is, therefore, most emphatically suggested in this situation that schools will "undertake only activities that are innocent" and "yet be wrongly condemned as discriminatory." This is not a remote possibility; it will be a virtual certainty in many instances.

TO IMPOSE UPON A SCHOOL THE BURDEN OF PROVING ITS INNOCENCE VIOLATES DUE PROCESS

Once a school has been branded "reviewable" by reason of the arbitrary criteria set forth in paragraph 3.03 of the proposed Procedure, Section 4.02 thereof imposes upon the school the burden of proving its innocence of discrimination. The school must "show that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis."

This is flatly contradictory to the holding in *Norwood* v. *Harrison*, 413 U.S. 455, 471 (1973) that: "no one can be required, consistent with due process, to prove the absence of violation of law."

In the *Norwood* case, the Supreme Court construed the complaint "as contemplating an individual determination as to each private school in Mississippi. . . ." 413 U.S. 470. It went on to say that: "relief on an assumption that all private schools were discriminatory, thus foreclosing individualized consideration, would not be appropriate* * * this school-by-school determination may be cumbersome, but no more so than the State's procedure of ascertaining compliance with educational standards. No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law." Id. at 471.

The interpretation by the District Judge in *Norwood* on remand, which pays lip service to the above opinion while drastically departing from the principle there enunciated, has never been subjected to appellate review. However, even that case was decided in an aura of massive resistance throughout the entire state to the integration of the state's public schools. The presumption resorted to in the remanded *Norwood* case arose out of a unique situation which no one contends applies generally today throughout the United States. Therefore, even if the *Norwood* presumptions were valid when enunciated (a highly doubtful presumption), it is totally arbitrary to apply the presumption nationwide, as the proposed Procedure would do.

CONCLUSION

The strong objections on the part of hundreds of thousands of citizens to the original proposed Revenue Procedure has caused a revision of the proposed Procedure. This revision, however, is primarily cosmetic. The unfair, arbitrary and discriminatory presumption of guilt remains.

The proposed Procedure constitutes an unconscionable attack upon religious education in the United States. The vast majority of the schools which would be affected by the proposed Procedure are Christian, religious schools. Furthermore, the proposed Procedure deliberately has excluded the majority of Catholic and Jewish schools, and now aims its attack almost exclusively at Protestant schools—an especially invidious religious discrimination.

While the disastrous effects of busing on the public school systems of the nation have no doubt contributed to the success of private schools since that practice began, it is totally unfair, arbitrary and wrong to presume that every private school created or expanded during this period has done so in order to escape racial integration. It is totally unconscionable to invoke punitive government actions against hundreds of thousands of Protestant Christians whose only motives are to provide their children with an excellent education in an acceptable moral atmosphere.

The existing Revenue Procedure 75–50 already requires tax-exempt schools to pursue nondiscriminatory policies if they are to retain tax exemption. It contains an invitation to minorities to file a complaint against any exempt private school which discriminates in practice. There have been few, if any, complaints filed.

Even if the IRS should rightfully be engaged in shaping national social policies, its existing procedures are more than adequate to do so.

The proposed Procedure will not open to minorities any school doors. The doors of the tax exempt schools are already wide open. The blacks refuse to attend such schools.

The proposed regulation will have one primary effect—to punish private schools for having come into existence subsequent to public school integration.

It should be totally, completely and finally abandoned.

Senator **Packwood**. The subcommittee will stand in recess.

[Whereupon, at 3:15 p.m. the subcommittee was recessed, to reconvene at the call of the Chair.]

[By direction of the chairman the following communications were made a part of the hearing record:]

STATEMENT OF U.S. SENATOR WILLIAM L. ARMSTRONG OF COLORADO

Mr. Chairman, I oppose the implementation of the Internal Revenue Service's revised "Proposed Revenue Procedure on Tax-Exempt Schools."

Under the revised proposal, the Internal Revenue Service—in the absence of a final decision by a Federal or State court or administrative agency—deems a private elementary or secondary school's tax-exempt status to be reviewable if that school:

Was formed or substantially expanded at a time of public school desegregation in the community;

Does not have a significant minority enrollment (defined as 20 percent of the percentage of the minority school age population in the community); and

Was, in fact, created or substantially expanded due to public school desegregation in the community.

I commend the Internal Revenue Service's attempt to define these elements more tightly in its revised proposal than it had in the original version; and, I appreciate its willingness to consider a variety of mitigating circumstances in the evaluation of these three criteria. However, the IRS proposal still constitutes an unacceptable presumption of guilt which places a burden of proof upon private schools to demonstrate their innocence. Should a private school, merely on the face of the three criteria, be flagged as a potentially reviewable school, it would have to demonstrate to the satisfaction of the IRS that the special nature of its curricula was not designed to exclude minorities . . . or that minority students, faculty or board members participated in the creation or expansion of the school . . . or that its founders, officers, or substantial contributors were not associated with efforts to oppose desegregation . . . or other mitigating circumstances.

In the case of a school that is deemed reviewable, the school may prevent the revocation of its tax-exempt status only by passing one of two tests: a significant minority enrollment test or a good faith test. To meet these tests, the school must open to IRS review its student recruitment, enrollment and financial assistance policies, its faculty recruitment and employment policies, its curricula (in the case where it can show a special minority-oriented course or courses), its participation in extracurricular activities, and the composition of its board members.

Requirements such as those I have just noted not only place an enormous burden of proof upon the school, they also represent an unhealthy opportunity for Federal intrusion by the IRS into the most fundamental areas of private school education and operation. And, even in its willingness to consider a variety of mitigating circumstances, the IRS is still offering a proposal that contains far too many areas for bureaucratic interpretation and manipulation. Of course, IRS maintains that the proposal's flexibility is designed so that only the real targets—private elementary and secondary schools that practice racial discrimination—are reached. But the IRS proposal goes too far.

I am also troubled by the IRS involvement in social policymaking inherent in this procedure. And I am concerned about the potential effects of such a procedure upon the Constitution's strict separation of Church and State. Furthermore, I believe there is a race consciousness inherent in so much of the IRS proposal that serious questions as to its permissibility should be considered in light of the Supreme Court's decision in *Regents of the University of California* v. *Bakke* (——U.S.——, 98 S.Ct. 2733), a decision which, in itself, has perhaps raised as many questions as it has answered.

We all know of the tremendous public concern over the Internal Revenue Service's proposal. Like other members of the Senate, I have received hundreds of letters from concerned parents, who have chosen private education for their children . . . not on the basis of racial bias, but because of the genuine concern they have for a quality education. As a family from Colorado Springs wrote:

"Segregation played no part whatsoever in our decision of a school. All children have always been welcome, regardless of race.

"We do oppose the inferior education the children receive in public school. That and a desire for a Christian education were our reasons for choosing a Christian school. The schools in our area are very over-crowded and their educational program is inferior. Also we oppose the smoking, drugs, bad language, etc., that are found freely in public schools."

A mother and father from Arvada wrote:

"Our children used to go to public schools right up to high school and we didn't like what we saw and heard. Teachers in public schools never seem to have time for children, nor do they seem to care if the work gets done, or if anything was learned.

"There are over 135 private schools in our greater Denver area; thousands of people send their children there to learn, and we are all willing to pay the price for their tuition, besides paying for public schools through taxes and bonds, without using public schools and their facilities.

"Our school has Spanish, black, and white children; we are not against a child's color or creed, we just want all our children to have a basic education, so that they are all able to read, write, and add. We know of children in 8th grade public school who are not even able to sign their own name."

A Denver mother who sends her son to a private school noted:

". . . the small classes and personal attention provide significantly better education than the Public School System.

"We made plans to send him to this school before 'busing' was considered in our city. We have chosen to live in an older inner-city neighborhood where the children he plays with are of various races. He has classmates who are black, Mexican, and Indian.

"We and the other parents are not wealthy. We struggle to pay the tuition. The donations at our school are low, and the school struggles to pay its bills. We, as a group, could not handle the expense of recruiting additional minority students and providing them with scholarships."

And, a father from Lakewood wrote:

". . . I have to struggle hard to send my children to a church-run, Christian school. My job has me working unusual hours, but I have to work extra jobs to pay the tuition for the education my children are receiving.

"I am a Spanish-speaking minority. I am sending my four children to a Christian school because I believe they get the religious training that they would never get in public school."

Mr. Chairman, these are the voices of concerned parents who want a quality education for their children and are trying to provide that to the best of their abilities. They are properly fearful of the Federal Government's heavy-handed interference in education . . . especially interference by the Internal Revenue Service.

I believe the issues raised in this proposed revenue procedure are far, far too serious to be decided at an administrative level. Accordingly, I have cosponsored, with Senator Hatch and others, S. 103. Our bill would prohibit the Secretary of the Treasury from implementing any guidelines for determining whether private tax-exempt schools have forfeited their tax exemptions through the adoption of racially discriminatory policies until December 31, 1980. Enactment of our legislation would give the Congress additional time to consider this issue and tailor a more refined and more appropriate remedy for the problem than the current revised "Proposed Revenue Procedure on Tax-Exempt Schools."

I thank the Committee for this opportunity to participate in their consideration of this matter.

STATEMENT OF HON. BILL CHAPPELL, JR., OF FLORIDA

Thank you, Mr. Chairman, for the opportunity to participate in your consideration of Internal Revenue Service proposals regarding the tax exempt status of private schools. At the outset, I would like to emphasize my fundamental belief that tax policy must be formulated by the Congress, and that the IRS, the revenue collecting agency of the executive branch, must confine itself to the administration and enforcement of congressionally formulated tax policy. For this reason, I will primarily address the role of the Congress in this controversy as it relates to my bill, H.R. 96, which would require a court decision before revocation of exemption and which enjoys wide support in the House.

Mr. Chairman, the 16th amendment to the Constitution provides that "the Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, ..." This proposal by the IRS, published in the Federal Register on August 22, 1978 and reissued on February 9, 1979, represents a further erosion of legislative power to the executive branch. Further, because this proposal is so comprehensive in nature, it would serve as a precedent for assumption of authority by executive branch agencies which the Congress can ill afford to accept.

It is indeed unfortunate that such a conflict between the branches of government has occurred over the issue of racial discrimination. Certainly, no one condones racially discriminatory policies, and everyone believes that institutions which are truly discriminatory should not enjoy a tax exempt status. However, the determination that an institution is racially discriminatory is a matter which properly should be adjudicated by the judicial branch of government and not left to the arbitrary whim of an executive branch bureaucrat. This need is made even more urgent because of the precarious position in which many praiseworthy non-discriminatory schools would be placed were the proposed rule adopted.

Any school formed or substantially expanded during a period of public school integration which does not have a significant minority student population would be subject to review by IRS. A significant minority student population is defined as a percentage equal to 20 percent of the proportion of school age minorities in the community served by the private school. However, many private schools serve a larger or smaller area than the community in which they are located and may find themselves in a reviewable status based on criteria unfairly applied. The expansion of a private school is another factor which, while it may be indicative of a racially discriminatory history, is more likely to be only an indication of the successful educational performance of the school's administrators. These arbitrarily established standards must be considered in light of their consequences for many private schools. Section 3.03(c) of the proposal states that "ordinarily, the formation or expansion of a school at the time of public school desegregation in the community will be considered to be related in fact to public school desegregation."

Despite this assumption, which a bureaucratic official may be expected to use to authorize an adverse decision, IRS itself recognizes the need for factors which have to be considered in mitigation, such as the abnormal expansion of a community, the fact that certain students are not drawn from the public schools, or that the school's expansion is roughly equivalent to other years not in the reviewable period.

While the earlier proposal was inflexible in its requirements, the February 9 guidelines are singularly susceptible to bureaucratic misinterpretation due to their broadness. Further constitutional difficulties other than the unauthorized assumption of power are obvious should this proposal be adopted. For example, the constitutional precept of due process is substantially disregarded. Certain private schools would be reviewed simply because of an administrative balancing of factors which will undoubtedly vary in outcome from case to case. To submit worthy non-discriminatory schools to such a test is not only unfair on its face, but will, for many financially precarious schools, have consequences which were obviously not envisioned by IRS. Aside from the severe chilling effect even a potential classification as racially discriminatory would have on contributors facing a loss of tax exemption, the legal and administrative expense of proving itself to be non-discriminatory would be an impossibility in many cases. By providing for judicial appeal of IRS determinations under its latest proposal, the service has attempted to provide a semblance of fair treatment, but for many of these schools, it also represents the possibility of costly legal action in order to prove its own non-discrimination. In other words, the burden of proof is still on the institution, and this runs contrary to our basic tenet of innocent until proven guilty. The entire administrative procedure outlined in this latest proposal is inequitable and costly to our citizens. Furthermore, the potential damage in relation to benefit achieved is so overwhelming as to clearly and undeniably indicate that this proposal should not be adopted by the Internal Revenue Service.

Also presenting unacceptable constitutional uncertainty is the express inclusion of religious schools in the proposal. The first amendment provides provides for non-interference of government in the practice of religion. Any change in the delicate relationship between church and state carries with it serious social and political questions which must be considered by the Congress and not by an administrative agency.

Certainly, despite IRS promised consideration of circumstances peculiar to individual schools, the opportunity for abuse or misjudgement regarding the reviewable status of religious schools is a real possibility. The interference of the Federal Government through its executive agencies, other than ensuring that educational instruction is adequate for each student and conducted in a safe environment, is totally unwarranted and represents an unconstitutional intrusion into the freedom of religious practice as guaranteed by the first amendment.

Mr. chairman, it is difficult for me to understand why IRS has not come to the congress for direction in addressing the problem of racial discrimination in private schools when considering the potential constitutional and social problems associated with the formulation of criteria for determining standards. As I understand it, IRS bases its authority to issue its proposal on "public policy" as interpreted by the courts. Surely, the Congress can give the best and most specific guidance on policy to IRS, since as the elected representatives of the people we are best equipped to reflect the views of the public. This is especially true in an area characterized by controversy and in which the Congress is constitutionally charged with responsibility for the formulation of public policy.

For this reason, I have introduced legislation, H.R. 96, which would directly address the problem of racial discrimination by private schools by amending section 501(c)(3) of title 26 of the U.S. Code to provide that tax exemption be revoked only when a private school has been properly adjudicated as racially discriminatory by a state or federal court. This amendment is completely consistent with the constitutional safeguards and current procedures for utilization of the judicial process provided by the Civil Rights Act of 1964 as amended.

This bill, which has been cosponsored by 88 of my colleagues from both sides of the aisle and all parts of our country, would maintain our tradition of innocent until proven guilty by shifting the burden of proof to the accusor, whether it be the IRS or an individual plaintiff denied admission or suffering similar treatment for reasons of racial discrimination. By shifting the burden of proof, H.R. 96 would allow a school to properly defend itself against charges of racism, an accusation which can not be taken lightly, in a truly adversary proceeding involving a justiciable controversy, a crucial element lacking in the IRS proposal. In this situation, attention would be focused on those schools which actually have given probable cause to suspect discrimination, rather than blanket accusation of all schools which were founded or happen to have been expanded during a certain period of time. Most importantly, an adjudication of racial discrimination in the courtroom is a more likely setting to adduce an accurate description of the facts.

The Congress must address the discrimination problem presented to it by the IRS while working to preserve its own constitutional prerogatives. This can best be done by clarifying procedures which IRS must use to revoke the tax exempt status of institutions which are truly discriminatory—not by allowing the executive branch to generate its own guidelines which are so broad as to be subject to considerable abuse of legislative intent—but by giving specific guidance to IRS in a manner which is fair to the vast majority of private schools which are worthy, non-discriminatory educational institutions.

In view of the constitutional difficulties inherent in this proposal, and in light of the potentially grave financial and social consequences of implementation, I urgently and strongly recommend that that IRS be requested to defer any action implementing this proposal until Congress has addressed the issue. Certainly, IRS should have an important role in advising the Congress. But the formulation of policy is a constitutionally mandated legislative function, and IRS must know in no uncertain terms that it is required to confine itself to the proper and equitable administration of our tax laws.

Again, Mr. Chairman, I appreciate having the opportunity to appear today to assist in your consideration of this important national issue.

CHAPTER 1—EXEMPT ORGANIZATIONS—26 § 501

(b) Tax on unrelated business income.—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in part II of this subchapter (relating to tax on unrelated income), but, notwithstanding part II, shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) List of exempt organizations.—The following organizations are referred to in subsection (a):

(1) Corporations organized under Act of Congress, if such corporations are instrumentalities of the United States and if, under such Act, as amended and supplemented, such corporations are exempt from Federal income taxes.

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying

on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

H.R. 96

"*Provided*, That the Internal Revenue Service shall not terminate for reasons of racial discrimination the exempt status of any organization listed in this section which is operated exclusively for educational purposes unless said organization is adjudicated as racially discriminatory in a court of the United States or of any State."

STATEMENT BY CARL MCINTIRE

Honorable Congressmen, I appear in two capacities:

First, as the pastor of the Bible Presbyterian Church of Collingswood, New Jersey, a church with 1,800 members where I have been pastor for 45 years. The church conducts a Christian school from Kindergarten through High School.

Second, as the president of the International Council of Christian Churches, which was organized in 1948 and consists today of more than 275 Protestant denominations throughout the world.

The Amended Revenue Procedures for Guidelines now before this Committee plans for a revolution the like of which we have not seen before. An attack is here being made upon the First Amendment, the Bible, Christianity, the rights of the family, the precious children of the country, which will make out of the United States something entirely different from that social order which God gave us from our founding fathers: our liberty and our First Ten Amendments.

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." It goes on to speak about freedom of speech and freedom of the press, but these are second in order.

The first great concern of those who drafted the Constitution was that there would be no possible government interference, directly or indirectly, in any way, in the religious life and religious activities of the citizens of this Republic. This First Amendment is sacred. It is the primary law of this land and it should be honored in every possible degree in this Committee and before the Congress of the United States. To transgress this, to tamper with it, to ignore it, or to rationalize it, is to enter the realm where God is supreme over the hearts of men. He is Lord in the conscience of the citizens of this country, who must consider Him every time they go into a voting booth and in secret cast their ballot for the good of their country and for the protection of their liberty.

The reason Christian people and Christian churches want religious schools which they build and support is that they are carrying out the teaching of the Bible, which they believe to be the Word of God. When God gave to Moses the Ten Commandments, as reported in Deuteronomy, chapter six, He told Moses: "And thou shalt teach them diligently unto thy children. . . . And thou shalt do that which is right and good . . ." (Deut. 6:7; 8:18.) Repeatedly, Moses was commanded, "Thou shalt teach them." Solomon, the wisest man who ever lived, said, "Train up a child in the way he should go: and when he is old, he will not depart from it." (Prov. 22:6.) And Paul the Apostle told young Timothy, "From a child thou hast known the holy scriptures, which are able to make thee wise unto salvation." (2 Tim. 3:15.) Those who have drafted these IRS guidelines, as they are called, have totally ignored the reality of education as it is desired by Christian people for their children. One cannot say why they did it, but the document presents itself to the public as pertaining to "certain private schools," and the publicity given throughout the land is that it has to do with private schools. This is deceptive! Eighty-five to ninety-five percent of the schools that have been organized in this century are religious, and various religious groups have started them that they might propagate and maintain their faith among the youth.

If one is to understand what has actually happened in our country, he must look at the question of religion and the place it has in the life of those who are sacrificing to establish schools where the Ten Commandments can be taught and where the Bible and prayer can be heard. The bringing in by the Government of any question or any matter that is going to affect in any way these religious schools is completely unconstitutional and constitutes open highway robbery, taking from the people their right to have their children learn their faith in schools which they support and in churches to which they belong and receive the ordinances of God. The chasm which has existed, or the wall which has been built up by the Constitution, has now been torn down and is totally shattered by this present action. It is devastating. The judgments and penalties of Government now will hang over every religious school. And it must be recognized that this is an assault upon the Bible, that we have never had before in the history of this country by any government agency.

Moreover, all of the government intrusion is to be in the hands of a few men who have themselves prepared the so-called "guidelines." The three branches of government which our fathers separated in the Constitution so that the people could be protected from men are here vitiated. These revenue procedures are law. They are made by those in the IRS. They are administered by those in the IRS. Those who violate them are brought to trial by those in the IRS. Judgment is pronounced upon them by the IRS. And the subjective elements and the uncertain elements which cover a broad area of undefined mischief abound throughout the entire document. This is as much the law as if it were passed by Congress, signed by the President of the United States, but it is so constituted that men do with it what they please, and they literally can roam all over creation, all over the political spectra, and implement it to their own personal, ideological and political satisfaction. It is now rule by men, not the law. Their "guidelines" are a cover for their own power.

Section 2, paragraph .03 (a), says, "The question whether a private school has a racially nondiscriminatory policy as to students is based on all the applicable facts and circumstances." That is the entire paragraph. Please, where are we going to be able to gather all the facts into one place, and who in the world is going to be able to bring to pass all of the circumstances? It must be "all," according to this mandate.

Then the next paragraph says, "If a school engages in any acts or practices that are racially discriminatory as to students . . ." Again we have the phrase, "any acts" of any kind or any practices that are deemed racially discriminatory.

One, therefore, looks for the definition of what should be called a racial discrimination. He finds it in Section 3, paragraph .01. Here the sky is the limit. The school, it is said, is not to discriminate "on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." Here is a black. He is an athlete, but he does not quite measure up to being on the basketball team or to play in every game of the team as the coach may think that he should. He immediately begins to cry, "Discrimination, discrimination." The other blacks join him. The community of blacks join him. He gets to the NAACP; they join him. There was no discrimination. The judgment of the coach was simply being manifest on the basis of the best qualified men at the time to use in a particular game. This type of thing is applicable to every single reference that is made here: the "administration of its educational policies." My, the charges that can be made, and used, and who decides to prosecute them? Well, the IRS. The Constitution puts all religious activity of any kind beyond the hand of Government and bureaucrats to whom Congress may have entrusted its law-making prerogatives. Now a man's enemies, or the religious opponents, can attack; if he speaks on public issues, he can and will be threatened with a "complaint" against his school, intimidation, briberies, actual discrimination by the IRS itself by not treating all schools equal. Corruption is becoming the order of the day.

Under "Definitions," Section 3, paragraph .02, "A school 'adjudicated to be discriminatory' means any school found to be racially discriminatory as to students by a final decision of a federal or state court of competent jurisdiction; by final agency action of a federal administrative agency in accordance with the procedures of the Administrative Procedure Act, 5 U.S.C. 551, et seq.; or by final agency action of a state administrative agency following a proceeding in which the school was a party or otherwise had the opportunity for a hearing and an opportunity to submit evidence. The terms 'final decision of a federal or state court' and 'final agency action' mean actions or decisions from which no further administrative or judicial appeal can be taken."

This could simply kill ninety-nine and nine-tenths of the schools in the United States that are religious. The expense of such procedures, hiring lawyers, paying for the court costs, going through the administrative process clear on up to the Supreme Court of the United States is calamitous. I can affirm: a poor man no longer has a chance in the United States to get a hearing or to get justice. It cannot be afforded. These Christian schools which have been started are here out of good conscience and this procedure is designed to destroy virtually all of them at the will of the IRS. All that has to be done is that somebody, a black, or another ecumenical church group, can file a complaint, take out affidavits alleging certain things did or did not happen, demand a hearing, get these processes under way, and even years may be consumed with the case.

I have had personal experience with this very same procedure down here in connection with another bureau, the Federal Communications Commission. Our Seminary, a theological seminary, purchased a radio station, WXUR. I am the president of the Seminary. Immediately the religious groups in the area objected to our views being presented throughout the community, and they complained to the FCC, asking that the license not be renewed. They had the ear and the support of the Broadcast Bureau of the FCC. The hearing was called. It lasted nine months. Before it finished, after seven years of processing, just as outlined here, a half a million dollars were spent on lawyers' fees at $125 an hour, and all the other expenses, and the U.S. Circuit Court of Appeals by a vote of two to one took the radio station off the air. But when the case finally got to that final juncture, the Court threw out all the objections, all the false charges, and the only thing left was that in the original application the station was alleged not to have fully revealed its program intentions. It had done so at the time, and Judge David Bazelon in his minority opinion said that the FCC had no right to require the knowledge of the programming content as a condition of their licensing; that would violate the First Amendment. But the station died. I have been through this very same process and death. Now the same procedures are here being forced by "law" upon these schools that are being organized to serve their God.

What must be seen by the Congress is, the issue so far as the schools are concerned is not integration. The IRS has made an idol out of integration and erected it in every Christian school and church with a school. These schools are coming into existence at the rate of one every seven hours because of the total breakdown of morals in our State-financed schools: sex, pregnancies, dope, murder, rape, assaulting teachers, destroying property, and the production at the end of high school of "functional illiterates." These Christians who are starting these schools do not want their children to be functional illiterates. They love them. The fundamentals of reading, writing, arithmetic—not the new math, but the good old multiplication tables—and with it all the Ten Commandments and the responsibility that man has to God. It is the moral bankruptcy of the public schools which has produced the rapid growth of the Christian schools—not fleeing integration. The IRS seems to have some kind of colored glasses. They are of the opinion that schools exist for the one and only purpose of integration. The fact that the First Amendment regulates and forbids their having anything to do with it, is no concern of theirs. They want to subordinate everything and everybody to their integration program and percentages; and they would usurp, slip into the sacred domain of the Church and gather to themselves an authority and a power which was never intended to be a part of their collecting of income taxes. The power to tax is the power to destroy. But how many thousand new agents will be necessary, and where would Proposition 13 come in?

In 1948, the International Council of Christian Churches was organized in Amsterdam and among its functions, spelled out in its constitution, is the following: "To encourage all members of the Council to promote on every continent, as God enables, an educational system for all ages which shall be free from the blight of rationalism and in which the Bible shall be basic, to the end that education may again become the handmaid of the Church rather than a foe to the whole Christian conception of God and the world." This was before the Supreme Court decision of 1954 and all the subsequent civil rights actions. This is the main purpose that Christians have for maintaining Christian schools. Perhaps I should point out just here to the Committee that all of this civil rights legislation has in it prohibitions concerning discrimination on the basis of race or color, and also creed, or religion. Now creed and religion are placed on the same level with color and race in these stipulations over and over again. Will the next step be that in order to be "consistent" under the statute we must now decree that these religious schools shall teach all religions, and not discriminate against anyone on religion: make the Jewish schools teach Christianity, make the Roman Catholic schools teach Protestantism, make the Protestant school teach atheism to the satisfaction of Madalyn Murray? If the IRS can enter into these religious sanctuaries, and the sanctuary which belongs only to the people under the Constitution, and introduce a question of discrimination on one point, they can certainly do it on another point of the same sentence. We are witnessing, as I said, a devastating, revolutionary assault upon religion and upon Christianity. The walls are falling down.

In my own case, our Christian school was started after prayer and Bible reading was put out of school. When Madalyn Murray won her case, we decided the time had come that if they could not pray and they could not read the Bible, could not recite the Ten Commandments, we had better get a school going where these things would be possible. This we did. And in my church we have an annual budget, which is subscribed in an annual Every Member Canvass. This is the way the church has been operating for over 45 years. On its benevolence side, it has a sizable contribution as a church to our school, which is run and operated by our church. All contributions are taken up Sunday in envelopes for the church, placed on the collection plate as an act of worship, and then each month from the church's treasury the money is paid out for the operation of the school. How in the world will the IRS refuse to permit tax exemption on the contributions to the Collingswood Church? Well, they will do it because according to their judgment there is confusion at this particular point. The churches will be at the mercy of the bureaucrats in Washington. Their financial policies and structures will be regulated from Washington in order to collect taxes.

But I think, finally, the impact of all this can be seen on the political level. A new crew now occupies many of the bureaus in Washington. Many of them are these younger men, on the second and third levels. They belong to the anti-war groups, those that supported Hanoi in the sixties. Some of our popular columnists have been naming them and pointing them out in recent weeks, in the various Washington departments. The one thing that these liberals and leftists have to deal with is the ideology in the country which blocks the progress of their revolutionary, socialistic goals, and what are the strong forces that inhibit them? The Bible, the Bible-believing Christians, and the fact is that these Christians in the country that are going into these schools are among those who are against abortion on demand. They were against giving away the Panama Canal. There is a strong patriotism in their schools. They are against E.R.A. They want the family and the teachings of the Bible concerning the place of the woman in relationship to her husband to be maintained. They are against the betrayal of Taiwan and the building up and financing economically and industrially of the Communist world. This hard, firm belief in the United States has got to be broken and the place to break it is to destroy Christian schools! The parents must be forced to put their children back into the public schools with their humanism, with their devastation of character! Any school that is religious exists as a domain which has written over it: "Hands off" to Uncle Sam."

One reads this 11-page amendment with a realization that what these men in the bureau are trying to get at is what is in the hearts of these particular people when they started their schools, and they want to ascertain as to whether they started their schools for racial ends, to get away from the integration of the public schools, and they think that perhaps they have found some sort of instrument to pry into the human heart of these schools. Thus, their appraisals as to the growth of the student body and things of that sort. Entire areas have been left so open, so broad, so subjective, so meaningless to those who read it, that those who administer it can give it a particular ideological stamp and brand, using their power to crush and to destroy contrary opinion and dissent that may arise in the country on great political issues.

Gentlemen of the Congress, in the name of our God—and we do have "In God We Trust" over the Senate of the United States and on our coins—I appeal to you to nullify, to countermand, to do what is necessary to stop this intrusion into the dominion that the First Amendment has protected for all of us who want to believe something and who desire to teach it to the youth. I do not hesitate to say that with the public schools like they are there is little hope for the country. But with the Christian schools developing and growing as they are, there is hope that at least we can try to have some law and order based upon the fear of God in the hearts of students.

Statement of Robert E. Jones, Director of Field Services, Americans United for Separation of Church and State

Dear Mr. Chairman and Members of the Subcommittee, we are meeting today to deal with a particularly difficut issue—whether or not the Internal Revenue Service can practicably and constitutionally limit tax exemption under Section 501(c)(3) of the Internal Revenue Code of 1954 to private schools which operate on a racially nondiscriminatory basis.

At the outset let me affirm that this organization supports the intent of the Revenue Procedure, or regulations, under discussion. We hold no brief for those private school entrepreneurs who have established nonpublic schools, whether secular or religious, for the purposes of avoiding public school desegregation.

Since the *Brown v. Topeka* decision of 1954, 25 years ago, this nation has attempted to deal with the problem of breaking up the old dual segregated public school system which existed in many communities and states of the country. One of the favorite devices for avoidance of public school desegregation has been the establishment of all-white "academies," many of them bearing the label of "Christian" schools, which have attracted pupils from families fearful of desegregation.

On December 6 last year, Americans United testified that we "are sympathetic to efforts aimed at reducing or eliminating discrimination in our society" and that we have long "opposed any form of direct or indirect government aid to nonpublic schools . . . at least in part on the ground that such aid would benefit institutions which, in varying degrees, divide students by religion, race, social class and in other ways."

However, in our December 6 testimony we found that there were certain constitutional problems which the proposed Revenue Procedure encountered, notably that of "excessive government intrusion into the internal affairs of religious bodies." The constitutional problem stems from the guarantee, in the First Amendment, of free exercise of religion, and would become acute when applied to religiously-oriented private schools.

To reiterate, from our December testimony: "Religiously-oriented private schools, as the Supreme Court has acknowledged in a series of rulings against tax aid for such schools, are generally integral parts of the religious mission of the sponsoring religious body. Their curricula tend to be permeated with a particular denominational point of view. Their student bodies, faculties, and administrations tend to be religiously homogeneous . . ."

In studying the revised Revenue Procedure, we note that IRS has met some of the objections raised in the December hearings by Americans United and other groups. In Section 3.03(b) on page 4, it seems clear that IRS has displayed sensitivity to the problem which Jewish or Amish schools might encounter, for example, where "special curricula . . . by their nature are of interest only to identifiable groups which are not composed of a significant number of minority students." This is certainly an improvement over the earlier Procedure.

Also, the revised Procedure displays sensitivity to the well-established systems of religious education, as for example, the Roman Catholic parochial school systems in Section 3.03(b) also on page 4 in paragraph three and following:

"If a particular school which is part of a system of commonly supervised schools would be treated as not having significant minority student enrollment under the foregoing provisions, it may nevertheless be considered to have a significant minority student enrollment if all the following conditions are met:

"1. Taking into account all schools operated by the system within the community, the school system, in the aggregate, has significant minority student enrollment;

"2. The schools within the community serve designated geographical areas, which designations are based on considerations other than race; and

"3. There is no evidence that the school system operates on a racially discriminatory basis, such as through the operation of a dual school system based on race."

Presumably the latter two paragraphs would take into account the parish school concept. We wonder, however, if criteria set forth on pages 6 and 7 of the Revenue Procedure, 3.03(c)(13) would not contradict the aforesaid, i.e.:

"Facts tending to indicate that the formation or substantial expansion of a school was related in fact to public school desegregation in the community include: * * *

"(13) The school in practice limits enrollment to students from a geographic area (or areas) with few or no minorities, and this limitation coincides with a public school desegregation plan that involves exchanges of students between such area or areas and one or more other areas that have a substantial school age minority population."

These changes from the original version of the Revenue Procedure are encouraging but still fall short of addressing wholly, the constitutional problem. A large church school system, which may have within the system individual schools predominantly white, without significant minority student enrollment, are effectively removed, it would seem, from coverage.

But what of the church-related schools which are related to a single congregation, which are individual schools, not part of a "school system?" We do not believe that IRS has met the constitutional test in applying its regulations to such schools. IRS has still not met the question of excessive government intrusion into the affairs of schools which are an integral part of the religious mission of the individual churches which sponsor them.

The proposed IRS Procedure would place a serious burden on the school operated by a single church congregation for the religiously-oriented education of its members' children. Effective minority recruitment, scholarships, tuition waivers, special minority-oriented curricula and the like might be quite beyond its means. Should it then be denied its tax exempt status?

Further, how would the IRS deal with the many religious private schools which are integral parts of a church and which have no separate fundraising, budgeting, or accounting mechanisms? Could the IRS remove the tax exempt status of a small Christian or Jewish congregation which operates a school in its basement as part of its religious mission? Would the IRS try to compel a local church to separate itself from its school?

We think the IRS is entering a constitutional thicket here which it might well try to avoid. We fail to see how a Revenue Procedure can be written which can be applied fairly and evenly, and which will not involve excessive government intrusion into and entanglement with religion.

STATEMENT OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM

The Center for Law and Religious Freedom (the "Center") is a division of the Christian Legal Society[1] founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and authorities to be able to act where the rights of Christians to exercise and express their faith are being infringed. Its resources include prominent constitutional attorneys and law professors as well as an awareness of national trends. The Center has held several regional conferences providing continuing legal education by experts in fields such as constitutional law, federal practice and procedure, non-profit organizations, state and federal taxation, and other recent developments. It has also participated in both legal and administrative proceedings. The Center's national membership and professional resources enable it to focus public attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized.

Counsel and the Center are versed not only in the law relating to the First Amendment to the United States Constitution but also the body of discrimination law under the Fourteenth Amendment and other federal statutes. Counsel have participated in numerous cases in these areas[2] and have published articles about the Federal anti-discrimination statutes.[3] These comments are offered to this subcommittee for their educational value in a highly complex area of the law.

SUMMARY

The Service is a revenue producing institution without proven competence in the difficult areas of First and Fourteenth Amendment constitutional law. Its revised revenue procedure displays this lack of expertise.

The Supreme Court, in its decisions interpreting the Fourteenth Amendment, has directed that no one can be proven to be racially discriminatory in the absence of "intentional" discrimination. The Court has set out in its decisions very careful methodologies for proving "intentional" racial bias. The proposed revenue procedure does not follow this obligatory manner of proving "intentional" discrimination. It also misuses statistics in attempting to prove discrimination. As a matter of constitutional law the procedure thus is fundamentally flawed. The procedure also limits a school's method of defense to proof of so-called "objective" evidence. There can be no such limitation on the type of proof offered to disprove intentional discrimination.

The procedure also does not display an awareness of its potential for endangering First Amendment religious values. By preferring those religious bodies which have in the past had private religious schools, it violates governmental neutrality toward religion and enters on the forbidden path toward judging competing religious beliefs. Moreover, since religious education is a recognized right protected by the First Amendment, the delicate balancing of competing values here is more appropriately made by Congress, since only "compelling" state interests can override religious liberty claims. The Congress, not the bureaucracy, should weigh the balance. The procedure also opens the door to governmental preference towards religious bodies which faithfully follow every public policy. Those who disagree with a particular policy will be taxed. This can inevitably lead to the establishment of favored religions. The danger additionally exists of excessive governmental entanglement with religious beliefs because of the surveilance necessary under the procedure as it is written.

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[1] The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys, law professors and law students. Today it includes over 1,800 members throughout the United States.

[2] See, *Walker* v. *Robbins Hose Fire Co.*,——F. Supp.——, Civil Action No. 74-172 (D. Del., February 8, 1979); *Lewis* v. *Delaware State College*, 455 F. Supp. 239 (D. Del. 1978); *Scott* v. *University of Delaware*, 17 FEP cases 1486 (D. Del. 1978) appeal pending (3rd. Cir. 1979); *Stallings* v. *Container Corp.*, 75 F.R.D. 511 (D. Del. 1977); *Fesel* v. *Masonic Home of Delaware, Inc.* 428 F. Supp. 573 (D. Del. 1977); *Keegan* v. *University of Delaware*, 349 A.2d 14 (Del. 1975) cert. denied 424 U.S. 934 (1976); *Hanshaw* v. *Delaware Technical and Community College*, 405 F. Supp. 292 (D. Del. 1975).

[3] See, "An Analysis of The Evidentiary Standard Under the Employment Discrimination Statutes," Equal Employment Practice Guide (Federal Bar Association: 1978); "Sex As A Bona Fide Occupational Qualification Under Title VII," 29 Labor Law Journal 425 (July 1978); "Evidence And Intent In A Fourteenth Amendment Employment Discrimination Case," 29 Labor Law Journal 72 (February 1978).

Finally, there is an absence of Congressional authority for the thrust of the government's entry into the First Amendment area relating to religious schools. Absent such authority the tax laws should not be used to enforce social policies.

I. FACTUAL BACKGROUND

Imagine part of a midwestern state where the only parochial schools have historically been Lutheran. Assume further that the number of Bible believing parents desiring to educate their children in the tenets of their particular faith in a totally religious atmosphere is growing. Most of these same parents, who are members of several local non-denominational fundamentalist churches, are concerned also with the quality of the educational product in the public schools, their perceived lack of discipline, and the educational philosophy of secular humanism[4] which many think to be pervasive therein. A pastor accepts a call to a local independent fundamentalist church and there leads an effort to establish a religious school. This pastor preaches and lives love and racial brotherhood and will not tolerate racial discrimination by any of the members of his church or school. Parallel with this development HEW determines that a surrounding public school district has discriminated against a particular racial minority. This newly formed church school draws students whose parents formerly sent them to the public school district, with which they were dissatisfied. The school is nondiscriminatory with respect to race, its only criteria for the choice of faculty and students is religious belief. There are, however, few if any, of the racial minority in question in the geographical area who are members of the group of nondenominational fundamentalist churches from which all of the school's founders and trustees and practically all of its students are drawn. Accordingly few enroll.

Alternatively, consider the small Roman Catholic community in a section of South Carolina. That State is predominantly Protestant. There has never been a Catholic school in the entire diocese because there have never been enough students to justify starting one. The Catholic community, though small, is growing rapidly and the Catholic parents, many of whom are transplants from the North, are anxious to establish a community of faith for both the students and faculty. Moreover, they have a parental desire to take their children out of the public schools and into a more disciplined and regimented atmosphere. Eventually an Order of priests is found to help establish a school. Inasmuch as this is the first private school in the area, the student body is exclusively made up of transfers from the local public schools. Simultaneously HEW adjudicates a surrounding public school district to be discriminatory with respect to race. There are few, if any, members of the racial minority in question in this area who are Catholic. So few enroll in the new Catholic school.

Were either of these schools intentionally established to exclude racial minorities? Under the revised revenue procedure they would probably not be entitled to a tax exemption.

Consider further an already existing Roman Catholic school in a medium-sized northern city. It is the only such school in the area and its student capacity is full. The Roman Catholic churches served by the school are predominantly white, containing only a few black parishioners. The racial composition of the Catholic school closely parallels that of the local Catholic churches, and as a result, the percentage of blacks within the school is markedly less than that found in the nearby public schools. The Roman Catholic population in the area is growing and there is an ever-increasing waiting list for admission to the various grades of the school. These parents are seeking the religious training and discipline found in the Roman Catholic school. The school makes the decision to expand and it increases in size by 30%. It takes in children from the waiting list who previously went to public schools in the area. Although selection is made without regard to race, preference is given to members of the predominantly white local Catholic churches. The school, of course, adheres to all the social teachings of the Catholic church, its principal has been active in the civil rights movement, and he makes certain that the social aspects of the gospel is not neglected during instruction. Each child attending the school learns that he must love his brother without regard for race. Concurrent with the expansion of this school, there is an HEW order adjudicating the surrounding public school district as discriminatory with respect to race.

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[4] See Alan N. Grover, Ohio's Trojan Horse (1977).

Finally, consider a section of Kentucky where most of the people, white and black, identify themselves as Baptists. Unfortunately, the whites are exclusively affiliated with churches which are members of a predominantly white Southern Baptist Convention, while the blacks largely attend churches which are part of the predominantly black group of Baptist churches. Berea Baptist, one of the local southern Baptist churches, has for several years operated a small Christian elementary school. The school is housed in the building which is used by Berea Street Church for its Sunday school and is staffed predominantly by members of the local southern Baptist churches. Its principal and pastor are constantly seeking to lead the nonbelieving community to salvation through Jesus Christ. They do not neglect the social gospel, but instead, teach and preach vigorously that unreformed discriminatory attitudes are sinful and must be abandoned. The school also has a waiting list and is known for its discipline and the community of faith it seeks to instill. It also decides to expand because of its long waiting list of children and parents dissatisfied with the public schools, and the fact that organized prayer is banned in those schools. Again, there are insufficient minority group members subscribing to the religious beliefs and practices taught in the school and few enroll.

Were these schools intentionally created to exclude racial minorities? Under the Revised Revenue Procedure the answer would probably be "yes."

Parallel with the establishment or expansion of the schools in the above examples was this Country's delayed fulfillment of the promises to the black race embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. It is understandable, since both these movements were occurring simultaneously, that some might view the recent founding or expansion of these schools as merely a vehicle for white flight from the public schools. However, with respect to these religious schools, this judgment would be incorrect because they do not discriminate on the basis of race. If their racial minority composition is not reflective of the greater community in which they are located, this is because minorities were not adherents of the particular religious doctrines taught at these schools. The problem with the revised revenue procedure arises in these and similar situations.

II THE REVISED REVENUE PROCEDURE

The revised revenue procedure adopts as a goal the seeking out and identifying of "certain private schools [which] have racially discriminatory policies as to students." (section 1) But the procedure created to reach this goal fails because of the Service's lack of understanding of the method of assessing racial discrimination, which has been carefully developed by the Courts. While the scope of the revised revenue procedure has been substantially narrowed, by excluding the prior "other" schools category (see section 2.05), little, if any, recognition of legitimate religious freedom concerns is contained therein.

The procedure for loss of tax exempt status is detailed in sections 3.03, 4.02 and 4.03. Section 3.03 states:

"Reviewable school means a school (i) formed or substantially expanded at the time of public school desegregation in the community served by the school; (ii) which does not have significant minority student enrollment; and, (iii) whose creation or substantial expansion was related in fact to public school desegregation in the community."

Three things are necessary for a school to be found to be a "reviewable school." Nowhere is it stated that being a "reviewable school" is equivalent to having been adjudicated by the Service an entity which is "intentionally discriminating" against racial minorities or which is being motivated by "discriminatory purpose." But without this necessary finding, if a school is found "reviewable," sections 4.02 and 4.03 come into operation. A "reviewable school" must show it has adopted some unknown mix of identified "actions or programs" (section 4.02), examples of which are found in section 4.03.[5] Unless some unidentified mix of "actions or programs" is being pursued by the school in question it will lose its tax exemption. (Section 5.02.)

III THE 14TH AMENDMENT

The Service is a revenue producing and monitoring agency. Its Congressional mandate never required it to acquire expertise in the area of the Civil Rights Laws or the Fourteenth Amendment. In dealing with the tax liability of huge corporations the Service, of course, needed much discretion so that taxes could be collected. Without discretion large corporations could keep the Service tied up in Court indefinitely, challenging tax liabilities.

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[5] None of these factors deal with religious considerations. They revolve around scholarship and recruitment programs for minorities, increased minority enrollment, minority employment as teachers or professional staff and minority oriented curriculum.

Once the Service entered the Fourteenth Amendment arena, however, it could not expect to continue to promulgate and follow procedures adapted from an entirely different context. A complete understanding of the problems posed by the revised revenue procedure necessitates some examination of the clear body of law which has developed pursuant to the Fourteenth Amendment defining its meaning, protections, and the limitations it places upon governmental action. Under the Fourteenth Amendment the courts have applied a uniform analysis to determine race discrimination in the Grand Jury,[6] school,[7] employment,[8] and housing or zoning discrimination cases.[9]

The landmark decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), demonstrates the interrelatedness of all types of discrimination cases brought under the Fourteenth Amendment. In *Washington* v. *Davis*, supra, the Supreme Court acknowledged that the threshold to finding discrimination in all of the foregoing cases is adequate proof of intentional discrimination. The same type of analysis and proof requirement applies to a charge of discrimination in the school, employment, zoning, or Grand Jury context. Whenever it is alleged that members of one race are being treated differently from members of another, and that this "disparate treatment" is racially based, a finding of discriminatory motive is crucial under the Fourteenth Amendment. Without it discrimination cannot be proven! *Washington* v. *Davis*, supra; *Teamsters* v. *U.S.*, 431 U.S. 324 (1977); *Furnco Construction Corp.* v. *Waters*, ——U.S.——, 98 S. Ct. 2943 (1978). Moreover, this burden of proving "intentional" discrimination is a heavy one. *Washington* v. *Davis*, supra, *Furnco Construction Corp.* v. *Waters*, supra.

The order or "method of proof" in an intentional discrimination case is fully discussed in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Accord, *Furnco Construction Corp.* v. *Waters*, supra. The party making a charge of discrimination must first come forward and introduce evidence sufficient to cause an inference of "intentional" discrimination to arise. The defendant must then come forward and offer proof of a legitimate non-discriminatory reason for the particular act in question. The party alleging discriminatory conduct then has the opportunity of showing that this legitimate non-discriminatory reason is merely a "pretext" for discriminatory conduct. If the charging party is able to convince the fact finder of "pretext," by a preponderance of the evidence, a finding of discrimination then can be made.

In this type of litigation our courts require a plaintiff or charging party to present a sufficient quantum of evidence, on those basic facts crucial to his case, to withstand a request that his case be dismissed. On these basic facts the plaintiff has what is called the burden of production or of going forward. The operation of presumptions in conjunction with burdens of production and going forward is especially prominent in dealing with claims of discrimination arising under the Fourteenth Amendment. In order to establish a defendant's liability, as an initial matter, a charging party need only present a "prima facie" case of discrimination. The burden of production then shifts to the defendant to adduce evidence of a non-discriminatory motive on his part. Without such rebuttal evidence an inference of intentional discrimination can arise and judgment would have to be entered for the plaintiff. But once the defendant produces evidence of a non-discriminatory reason for his conduct, the plaintiff must bear the burden of persuasion on the ultimate issue of intent. *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Laugesen* v. *Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975).

Importantly, the Supreme Court has recently made it clear that the initial prima facie showing that a plaintiff must make is not the equivalent of a factual finding of discrimination. *Furnco Construction Corp.* v. *Waters*, supra, at 2949–50. Rather a prima facie showing is merely proof of actions taken from which discriminatory animus or intent can be inferred "in the absence of any other explanation." Id. Once a prima facie showing is viewed in this manner it is clear that a defendant must be allowed proper latitude to introduce evidence which bears upon his motivation or intent and to give "any other explanation."

Of great note is the fact that in November 1978 the United States Supreme Court reversed a lower court decision where it appeared that too heavy a burden was placed on a defendant seeking to rebut a prima facie case. See *Board of Trustees of*

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[6] *Neal* v. *Delaware*, 103 U.S. 370 (1880); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

[7] *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[8] *Washington* v. *Davis*, 426 U.S. 229 (1976); *Teamsters* v. *U.S.*, 431 U.S. 324 (1977).

[9] *Village of Arlington Heights* v. *Metropolitan Housing Corp.* 429 U.S. 252 (1977); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126 (3rd Cir. 1977).

Keene State College v. *Sweeney*, ——U.S.——, 47 L.W. 3330-31 (November 13, 1978). In that case, because the lower court had misstated the legal standard which had to be applied to determine intentional discrimination, the Supreme Court reversed and ordered that the case be reexamined in light of the properly articulated legal standards. The *Keene* decision points to the basic problem with the revised revenue procedure because it does not articulate proper Fourteenth Amendment standards.

IV. THE IMPROPER USE OF STATISTICS

In its revised revenue procedure the IRS has sought to use statistical evidence to prove the existence of discrimination. The use of statistics to prove discrimination is a method of evidence by which one is able to infer discrimination because of the unlikelihood that a particular series of events happened by chance. The rationale for this use of statistics was defined by the Supreme Court in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), and is referred to as the rule of exclusion. The rule of exclusion is a method of proof whereby a prima facie case of intentional race discrimination is demonstrated by showing that a minority group is substantially underrepresented and that this is unlikely to have occurred by chance.

"The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process. See *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 n. 13 (1977); *Washington* v. *Davis*, 426 U.S. 229, 241 (1976); *Eubanks* v. *Louisianna*, 356 U.S. at 587; *Smith* v. *Texas*, 311 U.S. at 131." Id. at 494, n.13.

See also *Teamsters* v. *U.S.*, 431 U.S. 324 (1977) (statistics can prove employment discrimination).

The use of statistics helps us to infer discrimination by comparing for example the percentage of a minority within a particular student body to the percentage which one would expect to have absent discrimination. If the disparity is "statistically significant," then we may infer discrimination.[10] In *Castaneda*, supra, at n.17, the Supreme Court said that we may infer discrimination when the observed student body is "two or three standard deviations" different from the expected student body.[11] Thus, if the statistical probability of obtaining a particular student body is very unlikely, we can safely say that it is more probable than not that the result of the selection process was intentionally caused and that statistics can be used to infer intentional racial discrimination.

The first mathematical problem which must be answered in using statistics is the determination of how many people in the student body belong to each standard deviation. The foremula for this is the square root of the number of persons found in the student body times the percentage of the minority involved who are qualified to belong to the student body times the percentage of all others involved who are qualified to belong to the student body.

SD equals No. of persons times percent of majority times percent of minority. Once that number is learned then it is relatively easy to determine the number of standard deviations that the actual student body differs from an expected student body.

As an example, examine our first hypothetical fact situation found at page 1 above. As noted, this school's only criteria for the choice of faculty and students is religious belief. There are, however, not great numbers of the racial minority in question in the geographical area who are members of the group of nondenominational fundamentalist churches from which all the school's founders and trustees, and practically all of its students are drawn. The school initially enrolls 200 students. Six of them are black. The black population in the general geographical area from which the school draws its students is fifteen percent.[12]

However, the black population in the pool of those holding the fundamentalist beliefs which the school uses as a criteria for admission is only five percent.

Applying the *Castaneda*, supra at n.17, formula results in the following. The availability pool of qualified blacks for admission to the school is five percent. Two hundred students have been admitted to the school. The expected number of students who could be admitted using these qualifications is ten. (200 times .05 equals

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[10] The Supreme Court in *Castaneda*, supra, n.17 set out in detail how statistical significance is to be calculated and evaluated. This was reiterated in *Hazelwood School District* v. *U.S.*, 433 U.S. 299, at n.14 (1977).

[11] A 1.615 standard deviation difference is equivalent to a probability of 0.05, a two standard deviation difference is equivalent to a probability of 0.0213, and a three standard deviation difference is equivalent to a probability of 0.0027.

[12] Since the IRS in its regulation would expect 30 (200 times 0.15 equals 30) and six is only 20 percent of thirty, the school is presumably discriminating.

10). The observed number is six. Using the *Castaneda* formula, the standard deviation is 3.08 (the square root of 200 times .05 times .95 equals the square root of 9.5 which equals 3.08). The difference between the expected number of black students of ten and the observed number of black students of six is equal to four. Therefore, the observed rate is 1.29 standard deviations from the expected rate (4 divided by 3.08 equals 1.29). The disparity between the observed number and the expected number is not statistically significant because it is not two or three standard deviations as required by *Castaneda*, supra at n.17.

The IRS, however, in its regulation, has stacked the statistical deck in its favor. It only uses general population racial statistics and ignores specific qualifications which are necessary for admission to religious schools. Applying the *Castaneda* formula according to the IRS method results in statistical significance. The IRS contends that the availability pool in our hypothetical is fifteen percent. Two hundred students were admitted to the school. The expected number of students is thirty. (200 times .15 equals 30). The observed number of students is six. Using the *Castaneda* formula the standard deviation is 5.04 (the square root of 200 times .15 times .85 equals the square root of 25.5 which equals 5.04). The difference between the expected number of blacks in the student body which is 30 and the observed number which is six equals 24. The observed rate is 4.76 standard deviations from the expected rate. (24 divided by 5.04 equals 4.76). This is statistically significant according to the *Castaneda* formula since it is more than two or three standard deviations from the observed value.

The battle is therefore joined over which availability pool of blacks is proper for statistical analysis. The IRS requires general population statistics and religious schools will argue for the percentage of those qualified to be admitted to those schools which are black. The Supreme Court has definitively spoken on this issue. In the employment discrimination case of *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), the Supreme Court noted that comparisons with the general racial population in the community are improper. The comparison must be to that portion of the population which is "qualified" for admission to the entity involved. The Court went on, and stated in footnote thirteen,

"In *Teamsters*, the comparison between the percentage of Negroes on the employer's workforce and the percentage in the general area wide population was highly probative, because the job skills there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When *special qualifications* are required to fill particular jobs, comparisons to the general population (rather than to the *smaller group of individuals who possess the necessary qualifications*) may have little probative value." *Id.* at n.13 (emphasis supplied).

A determination of the proper availability pool of the minority from which statistics are calculated is crucial then to the decision on whether or not statistics can prove intentional discrimination. The Supreme Court requires that due consideration be given to the qualifications necessary for admission to an employer's workforce, or in this situation, to a student body. The lower Courts foresaw and have enforced this emphasis on the proper qualifications which define the relevant availability pool.[13]

Use of the proper availability pool of blacks thus determines that statistics have no probative value in proving intentional discrimination in our hypothetical example. The expected number of blacks was ten but the observed number was six. This was only 1.29 standard deviations away from the expected rate. According to the *Castaneda* formula this was not statistically significant.[14] By applying its simplistic analysis to religious schools which have specific religious criteria for admission the IRS has again evidenced its lack of expertise in the analysis of proof of discrimination.

V ANALYSIS OF OTHER 14TH AMENDMENT PROBLEMS

Aside from the statistical error discussed above, other Fourteenth Amendment problems remain.

(a) The basic error in the revised revenue procedure is its failure to follow the burdens of proof and proceeding which have been carefully laid out by the Supreme Court in great detail. The recent decision in *University of California Regents* v. *Bakke*, ——U.S.——, 98 S.Ct. 2733 (1978), makes it clear that governmental action pursuant to the Fourteenth Amendment must utilize the standard of proof required by the Fourteenth Amendment. The Service must, therefore, set out and prove "intentional" racial discrimination. Without a finding of "intent" any analysis is defective.

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[13] See, e.g. *Kinsey* v. *First Regional Securities Inc.*, 557 F.2d 830 (D.C. Cir. 1977); *Patterson* v. *American Tobacco Co.*, 530 F.2d 257 (4th Cir. 1976) *Hester* v. *So. Railway*, 497 F.2d 1374, 1379 (5th Cir. 1974); *EEOC* v. *DuPont*, 16 F.E.P. cases 847 (D. Del. 1977). See also B. Schlei and P. Grossman, Employment Discrimination Law (B.N.A. 1976), pp. 1172-81.

[14] The *Castaneda* formula was reaffirmed in the educational context in *Hazelwood School District*, v. *U.S.*, supra, at n.14.

In section 3.03(iii) the revenue procedure states that the creation or substantial expansion of a school is to be "*related in fact* to public school desegregation in the community." (Emphasis supplied.) What does this mean? Does it mean that intent or discriminatory purpose must be found? It appears not. Certainly in the four examples discussed above, schools were founded or expanded and drew students from the public schools. Is this a relation in fact to public school desegregation? These schools were founded for religious reasons. But under the Service's guidelines they would be found "reviewable schools," without any determination that they are "intentionally discriminating."

(b) Nor does the procedure clearly place the ultimate burden of proof and persuasion on the government. A prima facie case, as discussed above, can arguably be made by statistical proof concerning the racial composition of the student body, the time of the formation of the school and some other live testimony. The burden of going forward then shifts to the school in question. Once that school articulates a legitimate non-discriminatory reason to rebut the prima facie case, for example, the religious beliefs of its student body and the fact that insufficient minorities adhere to those beliefs in the community, the burden of going forward then shifts back to the Service to prove that this articulated reason is a pretext. The ultimate burden of proof always remains with the Service and it must be met by a preponderance of the evidence. But nowhere in the revised procedure is the decision-maker informed that he must always follow these burdens of proof, persuasion, and proceeding.

The revised revenue procedure identifies "some" possible types of proof which could be offered at a hearing challenging a school's tax exempt status. But the procedure does not address the burden of proof and persuasion. The regulation leaves too much discretion in the Service's hands. It will lead to inevitable erroneous findings when legitimate religious freedom concerns are articulated as non-discriminatory reasons.

(c) The revised procedure still evidences little awareness of the significance of the Supreme Court's decision in *University of California Regents* v. *Bakke*, supra. Detailed analysis of the *Bakke* decision reveals agreement by the majority of the United States Supreme Court on the following propositions. The Fourteenth Amendment requires an ultimate finding of intentional discrimination for violation of the United States Constitution. Secondly, unless a proven intentional constitutional or statutory violation has been shown, preferential classifications of one race over another cannot be sustained. The procedure in section 4.03 still puts the cart before the horse when it requires, for example, preferential treatment of minorities in the award of scholarships and other financial assistance without an earlier proven finding of intentional racial discrimination. The heart of the Fourteenth Amendment is the requirement that all citizens be treated equally regardless of their race or color. Preference for one race over another cannot be tolerated. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *TWA* v. *Hardison*, 432 U.S. 63 (1977). The IRS cannot require the preferential treatment of one race over another unless, at the very lest, it has previously been proven that a school is discriminating. In the absence of such a finding, there is no power under our Constitution to order affirmative action in the form of financial aid, minority recruitment of students and professional staff, or changes in the curriculum taught in the classroom. *Bakke* teaches that a showing of impact or low minority enrollment is not enough to prove intentional discrimination. This factor is crucial when a Service decision maker must consider whether enough evidence has been introduced to carry the government's ultimate burden of proof and persuasion. Statistics and time of formation ordinarily will not be enough to prove discrimination if a legitimate non-discriminatory reason is articulated by the school in question. The logical showing necessary for the loss of exempt status simply will not be proven if this is all the evidence the Service has to rely upon.

(d) Finally, in Section 3.03(c) the procedure states that the "determination that a school's formation or substantial expansion is not related in fact to public school desegregation must be based on objective evidence." What can this possibly mean? A defendant cannot be restricted in the evidence he can introduce to disprove that he is intending to discriminate. *Furnco Construction Corp.* v. *Waters*, supra. Any relevant evidence must be admissible to disprove an allegation of intentional discrimination. If a pastor took the stand and stated that he preaches racial brotherhood from the pulpit each Sunday and that his school so teaches, this would be testimonial evidence. Would the Service consider it objective? The regulation offers no definition of this term and it seems that such evidence would be excluded and would not be considered probative. Such evidence would be highly relevant, however, to determine the state of mind of the decision-maker who is supposedly discriminating. Proof of intentional discrimination relates to the subjective state of mind of a decision-maker. But the Service apparently seeks to limit such non-objective evidence. This again is an erroneous legal proposition under the Fourteenth Amendment.

VI. THE FIRST AMENDMENT RELIGION CLAUSES

The Service is a revenue producing institution. Its lack of expertise in the body of law relating to the Fourteenth Amendment has already been discussed. The Service has not shown any greater awareness of the Bill of Rights and the First Amendment problems which are raised by its revised revenue procedure. The procedure raises difficult questions concerning governmental neutrality towards religion, potential infringement of the free exercise of religion, the encouragement of state established religious beliefs, and excessive governmental entanglement with religion. The Service has rushed in where wise men ordinarily fear to tread.

A. Church and state

At the time that America was discovered many European nations had adopted a state religion. All citizens had to support this state religion, even if they personally did not accept the doctrines taught. Those who held differing beliefs often found themselves persecuted for those beliefs. A number of the first settlers in America were composed of these persecuted people. They saw America as a hope, not only for a new beginning, but as a place where they could worship God without restraint and according to their beliefs and practices. Because of the discriminatory practices experienced back home, these new Americans were determined to establish a government that would not allow their freedoms to be abridged. This determination is reflected in the Bill of Rights and specifically in the First Amendment.

Today, for some Americans the vision of our forefathers threatens to grow dim. As Justice Hugo Black remarked, "[t]oday most Americans seem to have forgotten the ancient evils which forced their ancestors to flee to this new country and to form a government stripped of old powers used to oppress them. But, the Americans who supported the Revolution and the adoption of our Constitution knew first-hand the dangers of tyrannical government." Black, The Bill of Rights, 35 N.Y.U. L.Rev. 865, 867 (1960). James Madison emphasized that "it is proper to take alarm at the first experiment with our liberties." Madison, A Memorial And Remonstrance, II Madison 183-191. Those first Americans saw the consequences of a violation of principle and were prepared to act against that violation before an illegal assertion of power strengthened itself through continual exercise. The alarm which has been raised in the religious community by the Services's revenue procedure should be viewed in this context; many individuals have recognized the danger involved in the principle the Service is asserting.

B. Governmental neutrality

The First Amendment religion clauses provide that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Considering the purposes behind both of these clauses, the Supreme Court has insisted on neutrality with respect to the government's stance towards religion. In *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1969) the Court noted:

"Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference."

And in *Roehmer* v. *Md. Public Works Board*, 426 U.S. 736, 747 (1976), the Court emphasized that "neutrality is what is required." See also *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952); *Walz*, supra at 669; *Wisconsin* v. *Yoder*, 406 U.S. 205, 234 n.22 (1972).

The revised revenue procedure, however, provides in section 3.03(c)(6) that in an extraordinary situation the Service will consider the fact that:

"The school was formed or expanded in accordance with a long-standing practice of a religion or religious denomination which itself is not racially discriminatory to provide schools for religious education when circumstances are present making it practical to do so (such as a sufficient number of persons of that religious belief in the community to support the school), and such circumstances are not attributable to a purpose of excluding minorities."

This regulation violates the principle of governmental neutrality in several ways. Contrast the hypothetical fact situations above where Catholics sought to expand or form schools versus other faiths which established such schools despite the fact that they did not have a long history of private schools. The motivating force for these latter denominations forming schools was dissatisfaction with discipline, the perceived philosophy of secular humanism which was being promulgated in the public schools and the desire to form a totally religious educational environment. Under the regulation these schools would have a greater likelihood of being adjudicated racially discriminatory than Catholic schools. The regulation apparently gives the Service the authority to define what is a long-standing practice of a religion. It also grants preference to those denominations which actually had schools in the past as against those which seek to establish schools in the present. Apparently the Service has set out to judge the religious truth of different faiths which at present seek to found schools. The Service will decide whether or not their religion requires schools.

James Madison labeled the suggestion that "the Civil Magistrate is a competent Judge of Religious Truth" as an "arrogant pretention falsified by the contradictory opinion of Rulers in all ages, and throughout the world."[15] The Supreme Court has simply said that government cannot inquire into the validity of a religious belief or practice. Government has no business assessing whether a particular religion's belief requires private schooling.

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men . . . Men may believe what they cannot prove. *They may not be put to the proof of their religious doctrines or beliefs* . . . The First Amendment does not select any one group or any one type of religion for preferred treatment." *United States v. Ballard*, 322 U.S. 78, 86–87 (1944). (Emphasis supplied.)

Less than a decade later, in *Fowler* v. *Rhode Island*, 345 U.S. 67, 69–70 (1953), the Supreme Court held that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment" for another group.

When the Service in its regulation seeks to prefer one religious practice over another or seeks to determine the validity of the belief of the need for private schools it endangers the neutrality mandated by the First Amendment. The Service simply cannot inquire into the validity of such beliefs held by any denomination or prefer one denomination's beliefs over those of another.

C. The free exercise clause

Religious education is protected by the Free Exercise Clause of the First Amendment. In every case involving religious education that has been ruled on by the Supreme Court it has been found that Christian education is a religious activity protected by the First Amendment. For example, in *Lemon* v. *Kurtzman*, 403 U.S. 602, 609 (1970), it is stated that:

"Although the Court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was 'an integral part of the religious mission of the Catholic Church.'"

Justice Douglas, in his concurring opinion in the same case, stated this fact as follows:

"The analysis of the constitutional objection to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith." *Id.* at 628.

And in *Meek* v. *Pittinger*, 421 U.S. 349, 366 (1975), the Court stated that:

"The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs."

Because of the religious influence in the teaching of secular subjects, the Court found that it could not approve funding even of secular instruction in private Christian schools.

The conclusion must be drawn that if the education of students by these private Christian schools is so religious as to violate the establishment clause when public funds are granted them, then the religious nature of the schools is also entitled to the protection guaranteed religion by the free exercise clause.

Once it is established that education is a religious liberty interest, for any governmental action to stand which directly or indirectly affects this religious interest, the balancing test provided in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), must be applied. The State regulation must be justified by a "'compelling state interest in the regulation of a subject within the State's Constitutional power to regulate.'" Id. at 403. More specifically,

"It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " Id. at 406.

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[15] II The Writing Of James Madison, 183-91 (G. Hunt Ed. 1901).

The later case of *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) is in accord with this statement of the law.

"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." See also *Ohio* v. *Whisner*, 41 Ohio St.2d. 181 (1976); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The revenue procedure enters this delicate area. It raises questions of compelling state interest at the intersection of legitimate claims under the free exercise clause of the First Amendment. The Supreme Court has pointedly observed that it has never addressed this type of question. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). The delicate balancing and identification of compelling state interests is more of a legislative rather than an administrative function. The Congress and not the bureaucracy is a more appropriate forum for the careful balancing that must take place.

For example, the looseness of the procedure with respect to the Fourteenth Amendment, discussed above, raises questions about a religious school's ability to admit or deny admittance to any student applying to the school as well as the school's ability to hire and fire teachers. Numerous affirmative requirements identified in the regulation could affect the ability of schools to hire only teachers of a particular religious belief or to admit only those students who either belong to the Church or are willing to subscribe to its religious dogma. Congress, not the Service, should address these issues.

D. The establishment of religion

The policy decision behind the revised revenue procedure stems from the Service's choosing to construe 26 U.S.C. section 501(c)(3) to require educational institutions to adhere to the Service's definition of public policy. The Service contends that the legislative intent behind 501(c)(3) is to afford exemptions only to educational organizations that do not violate any federal public policy. The seriousness of this policy decision arises from the fact that it will ultimately conflict with the establishment clause of the First Amendment when it is applied to religious educational institutions.

It has already been urged that the Service also seek to enforce public policy relating to sex discrimination through section 501(c)(3).[14] It is beyond dispute that certain religious denominations do not believe that females should hold certain pastoral or teaching positions. Is the Service to become involved in these disputes? Will the Service lend its support to one side in these debates by revoking the tax exempt status of offending religious organizations? What will be the next policy to be enforced?

The Supreme Court has declared in *Roe* v. *Wade*, 410 U.S. 113 (1973), a public policy permitting abortions unregulated by the State during the first trimester of pregnancy. Will the Service next seek to enforce this public policy against religious schools which teach that this is morally wrong?

This is the danger posed by the revised revenue procedure. Religious organizations are to be denied tax exemptions unless the Service determines that their purposes and practices accord with federal policy. Exemptions will only be granted to those religious organizations which totally agree with all federal policies. Unless a church stays in step with federal policy it will lose its tax exemption. Such an application of the law will inevitably lead to the government favoring those religious organizations that parrot federal policy over those which disagree. The favoring of one religion over another was meant to be forbidden by the establishment clause of the Constitution. To strengthen those religious organizations which follow all federal public policies, and to tax those which disagree with "any" public policy, leads to the establishment of approved religion. Taxation is, of course, one form of oppression of religion by government. *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 793 (1973).

E. Excessive entanglement with religion

On March 21, 1979, the Supreme Court in *NLRB* v. *Catholic Bishop of Chicago*, —— U.S. ——, 47 L.W. 4283, noted that inquiry into the sensitive area of church school-employee relationships raised serious questions of forbidden governmental entanglement under the First Amendment. Because of this danger, the Court ultimately held that the government could not enter the area of religious education for this type of labor management regulation. In *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), in sustaining tax exemptions for religious (along with other charitable) property, the Court noted that such exemptions result in less entanglement with religion than would the taxing of church property: such as giving "rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Id. at 674. The Court was particularly concerned with avoiding (a) substantive "governmental evaluation" of religious practices, id., and the entanglement of "government and difficult classifications of what is or is not religious." Id. at 698 (Harlan, J. concurring). As noted above, the revenue procedure in section 3.03(c)(6) will directly involve the government in the evaluation of religious practices and difficult classifications of what is or is not religious. In deciding to favor religions with long established religious schools the government is in effect deciding that the more recent establishment of schools by particular denominations is not motivated by religious belief. These decisions will have the direct effect of entangling the government in religious affairs. The surveillance necessary to enforce the revised revenue procedure also can lead to entanglement difficulties.

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[14] By letter to the Service dated March 20, 1978, Mr. Jeffrey M. Miller, Assistant Staff Director For Federal Evaluation of the United States Commission on Civil Rights, made the following demand: "We also believe that IRS should specifically prohibit racial, ethnic and sex discrimination in the treatment and selection of faculty."

As noted throughout this testimony, the Service has entered an extremely sensitive area. Few can dispute our nation's goal of eliminating racial discrimination, embodied in the Fourteenth Amendment. It is disputable, however, whether the Service has fully considered and protected the vital religious interests of those religious educational institutions which it has included in its revenue procedure. If the Service's procedure is made effective these institutions be opened up to further governmental regulation in areas other than race. The Service does not appear to be the proper governmental body to engage in the required analysis and the balancing between the Fourteenth and First Amendments. The Congress is better equipped to identify any overwhelming public policy outweighing legitimate First Amendment concerns.

VII THE SERVICE'S INTERPRETATION OF SECTION 501(c)(3) EXCEEDS THE POWER DELEGATED TO IT BY CONGRESS

"[T]he federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning." *Commissioner* v. *Tellier*, 383 U.S. 687, 691 (1966).

With the revised revenue procedure the Service is seeking to enforce its recent policy decision that despite the express provisions of section 501(c)(3) and the regulations found at 26 C.F.R. section 1.501(c)(3)-1, religious and educational institutions will not be exempt from taxation if they violate any clearly declared federal public policy. The dangers of this open ended assertion of authority by the Service, without explicit congressional authorization, were recently identified in *Bob Jones University* v. *United States of America*, Civil Action No. 76-775 (D.S.C., December 26, 1978), slip op. at 25,

"In these administrative pronouncements the IRS, in effect, announced that it will implement section 501(c)(3) on the basis of whether the taxpayer has abided by federal law or public policy. The section is to become the IRS's mechanism for disciplining wrongdoers or promoting social change. The Supreme Court ruled in *Tellier* that use of the tax laws for the former purpose is improper and it follows that the same rule would apply to the latter. In addition, the Court is concerned by the many dangers inherent in defendant's interpretation that exemptions may be revoked for violations of federal public policy. Federal public policy is constantly changing. When can something be said to become a federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. Citizens could no longer rely on the law of section 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some non-elected IRS personnel producing bureaucratic tyrrany."

This, of course, is the danger inherent when a revenue producing agency enters the area of promoting social change. This danger is multiplied many fold when the agency also enters the area of First Amendment religious freedom. Because of the lack of explicit Congressional authority for its revised procedure and the dangers the procedure poses to the First Amendment freedoms of legitimate religious educational institutions, the Congress should consider either banning the revised revenue procedure entirely or specifically exempting the church-related and church-operated schools found in section 2.01.

VIII THE JUDICIAL AUTHORITY RELIED UPON BY THE SERVICE

In support of its revenue procedure the Service throughout has been relying upon three cases. *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C. 1971), aff'd. per curiam sub. nom. *Coit* v. *Green*, 404 U.S. 997 (1971); *Norwood* v. *Harrison*, 382 F.Supp. 921 (N.D. Miss. 1974); *Brumfield* v. *Dodd*, 405 F.Supp. 338 (E.D. La. 1975). These cases are inappropriate for the following reasons.

The *Green* court explicitly stated that it considered no questions involving First Amendment religious freedoms or religious schools. It made no reference to schools which select students only on the basis of religious belief. 330 F.Supp. at 1169. The schools involved therein, moreover, were admittedly segregationist. They were similar to the de jure educational institutions which were integrated pursuant to court orders subsequent to *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Such cases of admitted intentional discrimination are easily proven. *Green* does not, however, analyze the situation where a school has no admitted segregationist policies but has a low minority enrollment. In this category of case intentional discrimination must always be proven. Finally, *Green* was, in its outcome, a collusive suit because during the course of its litigation the Treasury Department adopted plaintiff's position. The Supreme Court has noted that its affirmance in *Green* lacks the precedential weight which normally is attached to a truly adversarial controversy because of this change in the Treasury Department's position. *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974).

Norwood suffers from the fact that it was decided prior to *Washington* v. *Davis*, supra, and the flood of discrimination cases decided by the Supreme Court subsequent to *Washington* v. *Davis*. The *Bakke* decision discussed above is contrary to the affirmative steps *Norwood* required. Moreover, *Norwood* states that a challenged school must meet a "clear and convincing" burden in rebutting a prima facie case. 382 F.Supp. at 96. This is an incorrect statement of the law. The ultimate burden of proof never shifts from a plaintiff to a defendant in proving intentional discrimination. Nor did any school involved in *Norwood* follow an admission policy which limited its applicants solely to adherents of a particular religious belief. The hypothetical fact situations set out above, and the religious freedom considerations they raise, were not present nor addressed in *Norwood*.

Finally, the *Brumfield* decision is another case dealing with admitted segregation. It involves the easy burden of proving "intentional" discrimination which arises when discrimination is admitted. *Brumfield* considers none of the First Amendment issues raised by religious educational institutions objecting to the revised revenue procedure. Finally, it does not consider any governmental authority to revoke any previously granted tax exempt status.

The authorities relied upon by the Service in support of its regulations either improperly analyze the body of Fourteenth Amendment law, do not address valid religious freedom concerns or deal with fact situations far different from those with which the Center for Law and Religious Freedom is concerned. These authorities are simply inappropriate to support the breadth of the Service's proposed revenue procedure.

IX CONCLUSION

The Center For Law and Religious Freedom has sought to identify and explain serious issues of constitutional significance which the proposed revised procedure implicates. The procedure improperly identifies, analyzes and allocates the burdens and methods of proof and proceeding necessary to prove racial discrimination. Governmental neutrality towards religion, the free exercise of religion and the prohibition on the governmental establishment of religion will also be endangered by the procedure as written. Finally, the procedure raises serious questions concerning Congressional authorization for this entry into the First Amendment area. It is hoped that the legal analysis contained herein will be of assistance to this Subcommittee in its deliberation on S. 103 and S. 449.

Warthen, Ga., *April 18, 1979.*

Mr. Michael Stern,
Staff Director, Committee on Finance,
Dirksen Senate Office Building, Washington, D.C.

Dear Sir: Your support of *Senate Bill 103* . . . "To provide that the IRS may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies" and your support of *Senate Bill 449* "To amend the Internal Revenue Code of 1954 to provide that tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be contrued as the provisions of Federal assistance" would be greatly appreciated.

As tax payers and citizens of the United States of America, we feel that private schools provide remaining opportunity for sound and fundamental education in this country and do not understand why any government agency would want to discourage such efforts.

Again let us solicit your support.

Sincerely,

Mr. and Mrs. J. E. McCONNELL.

APRIL 20, 1979.

DEAR MR. STERN: I am writing in behalf of a private school that my children attend. I believe private schools provide remaining opportunity for sound and fundamental education in this country and do not understand why any government agency would want to discourage such efforts.

Would you please support Bill 103 and Bill 449 in the Senate Hearing on April 27.

Thank you for any efforts that you might make on our behalf.

Sincerely,

HARRIETT AMERSON.

SANDERSVILLE, GA., *April 23, 1979.*

MICHAEL STERN,
Staff Director, Committee on Finance,
Dirksen Senate Office Building, Washington, D.C.

DEAR MR. STERN: I have written my Congressman asking for their support for Senate Bill 103 and Senate Bill 449. As Staff Director of the Finance Committee, I ask you to please give these two bills your every consideration and support.

Those private schools who are compliance with the 1975 guidelines for tax exempt school should not be considered as a reviewable school. The public schools are already confused from continued mandates and interference from the Federal Government. I feel that most private school are providing the last remainding opportunity for a good, fundamental education.

Sincerely,

RUTH B. AIRRETT.

APRIL 17, 1979.

MICHAEL STERN,
Staff Director, Committee on Finance,
Dirksen Senate Office Building, Washington D.C.

DEAR SIR: As parents we are concerned about the IRS proposal concerning regulations for tax exempt status for private schools.

Please support Senate Bill 103 "To provide that the IRS may not implement certain proposed rules relating to the determination of whether private schools have discriminatory policies."

Also, please support Senate Bill 449 "To amend the Internal Revenue Code of 1954 to provide that tax exemption of certain charitable organizations and the allowance of a deduction for contributions to such organizations shall not be construed as the provisions of Federal assistance."

We would greatly appreciate your support of the above mentioned bills.

Yours very truly,

Mr. and Mrs. VAN C. PRINCE.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 14, 1979.

Hon. HARRY BYRD,
Chairman, Subcommittee on Taxation and Debt,
Senate Finance Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR BYRD: On April 27, 1979 I requested the opportunity to submit written materials to the Subcommittee on Taxation and Debt conveying the views of the Department of Justice concerning the proposed revenue procedure on private tax-exempt schools. Enclosed are five copies of my written statement and additional materials submitted for the record. I have also included five copies of this letter and respectfully request that this letter and accompanying materials be made a part of the record of the hearings held by the Subcommittee on April 27, 1979.

As I understand it, the purpose of the hearings was to receive testimony on S. 103 and S. 449, two bills which would affect implementation of the proposed revenue procedure on private tax-exempt schools published for comment on February 9, 1979. My written statement and accompanying additional materials provide historical background on the development of the proposed revenue procedure, information and data showing the need for the procedure, and an analysis of the standards of the proposed procedure which demonstrates that those standards are consistent with the standards used by the federal courts in similar circumstances. We believe the proposed procedure is a necessary and appropriate measure to insure that the federal government does not provide financial support to private racial discrimination through any arrangement.

The necessity of denying federal aid in any form to private racial discrimination has not only legislative but also constitutional and moral underpinnings. Therefore, any legislation which has the purpose or effect of continuing such aid raises substantial constitutional problems. The written statement submitted with this letter and my previous testimony before the Subcommittee on Oversight of the House Committee on Ways and Means on the same subject make it clear that we believe the Commissioner has proposed a balanced and responsible approach to accommodating legitimate concerns of religious and other organizations while defining an objective and understandable procedure for enforcing the nondiscrimination principle. While problems will no doubt arise in the implementation and administration of the proposed procedure, including, perhaps, some of the issues of concern to members of the Subcommittee, we believe such problems can be solved by the sensible and sensitive administrative approaches which Commissioner Kurtz has described, without recrimination, in a spirit of understanding and not one of confrontation. We believe that it is time to get on with the job, and the Department of Justice stands ready to consult with and advise the Internal Revenue Service on any legal and policy issues that may arise.

I appreciate this opportunity to present the views of the Department to the Subcommittee. If the Subcommittee has specific questions concerning this subject or the pending bills, we will be happy to respond to any inquiries.

Sincerely,

JAMES P. TURNER,
Deputy Assistant Attorney General,
Civil Rights Division.

STATEMENT OF JAMES P. TURNER, DEPUTY ASSISTANT ATTORNEY GENERAL OF THE CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

I appreciate the opportunity to submit this statement concerning the IRS's proposed revenue procedures for private, tax-exempt schools. The Department of Justice has, for a number of years, urged the need for effective procedures that would deny federal tax-exempt status to "segregation academies" established in the wake of public school desegregation. We and the federal courts have been dealing with the phenomenon of "segregation academies" for more than a decade. To my knowledge, this is the first occasion this Subcommittee has had to directly consider the issue. Therefore, I believe that it is appropriate to preface my comments on the revenue procedures under consideration with a brief historical background on both the private schools in question and the development of the revenue procedures themselves.

First, it should be plain from the outset that the procedure under consideration does not attempt to deal with all racially discriminatory, private, tax-exempt schools. Earlier rulings (e.g., Rev. Rul. 71-447 and Rev. Rul. 75-231) or procedures (e.g., Rev. Proc. 75-50) have dealt with racial discrimination by private schools in general. The current, proposed procedure focuses specifically on private schools which have been adjudged racially discriminatory or which are all-white or virtually all-white and were formed at or about the time of public school desegregation. The previous general revenue rulings and procedures have established the principle that private schools which are racially discriminatory as to students are not entitled to federal, tax-exempt status and that contributors to such schools are not entitled to a tax deduction for such contributions. If one agrees with that principle, the only questions concerning the current proposed revenue procedure and (1) whether it is appropriate to focus on the two categories of schools described and (2) whether the standards adopted in the procedure are appropriate and adequate to separate the discriminatory from the nondiscriminatory.

I. HISTORICAL BACKGROUND

A brief review of the historical background of the formation of "segregation academies" and of the development of the standards for determining the federal tax-exempt status of private schools will demonstrate that the currently proposed revenue procedure is both necessary and adequate to deal with the problem. While the formation of "segregation academies" and the development of standards for federal tax-exemption followed a somewhat parallel course, a separate discussion of the history of each would promote a clearer understanding of the issues relevant to consideration of the proposed revenue procedure which is the subject of review by this Subcommittee.

A. The formation of segregation academies

Close upon the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), there were suggestions for the planning of private school systems to take the place of the public school systems, which some states had threatened to abolish if desegregation was required, including the suggestion of the use of church schools in the private system. See, e.g., McLeod, A Program for Private Schools, 21 Ala. Lawyer 73 (1959).[1] Major efforts to establish "private" schools in opposition to public school desegregation did not, however, occur until the early and mid-1960's, and those efforts were an integral part of the "massive resistance" legislation enacted by some states. The close parallel between the formation of private segregation academies and the passage of state tuition grant or tuition loan legislation is described clearly in numerous decisions voiding such state legislation. For example, a federal court order to desegregate the Macon County, Alabama, schools resulted in the following sequence of events in Tuskegee:

"By September 12 every white pupil had withdrawn from the [desegregated public] school. Of the original 250 [white students] registered to attend Tuskegee High School, approximately [140–150 transferred to other all-white public schools] . . . The remainder of the students went to a "private" institution that has been set up in Tuskegee and named Macon Academy; this school has been limited to white pupils. Governor Wallace announced publicly that the State Legislature had provided for grants-in-aid to private schools and assured the organizers of the Macon Academy that the Macon County Board of Education would cooperate in making grants-in-aid available through the use of its statutory authority to provide such aid to students in lieu of operating a particular public school." *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743, 747 (M.D. Ala., 1964) (3-judge court).

Similar actions by state or local officials are chronicled in other decisions. For example, the actions of the Prince Edward County and Surry County, Virginia, school officials in support of the respective "private" schools formed in those counties are described in *Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F.2d 486, 489 and 491 (4th Cir., 1964). In Prince Edward County, the court noted that when ordered by a federal court to open the public schools, the officials: "appropriated $189,000 to reopen and maintain the public schools expected to accommodate approximately 1600 Negro children. At the same meeting, the Supervisors allotted $375,000 for 1964–65 tuition grants for an approximately equal number of white students expected to attend "private" schools." 339 F.2d at 489.

As to the Surry County case, the court noted that the Commonwealth Attorney prepared the articles of incorporation for the Surry County Educational Foundation and that the Treasurer of the county was also the treasurer of the Foundation. Upon the assignment of "seven infant Negro plaintiffs" to the white public school:

"All of the white students applied for admission to the Foundation school, and all were accepted. Several Negroes likewise sought admission to the Foundation school, but their applications were all rejected. All white public school teachers resigned, and all were immediately hired by the Foundation." 339 F.2d at 491.

An almost identical sequence of events occurred in Louisiana as described in *Poindexter and United States* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 836–44 (E.D. La., 1967) (3-judge court) aff'd *per curiam* 389 U.S. 571 (1968), and other earlier cases in that State,[2] and also in Mississippi as described in *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1391–92 (S.D. Miss., 1969). See also, *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968) aff'd per curiam, 393 U.S. 222 (1968).

The efforts to provide state support to such "segregation academies" has continued until recent years, and the United States Department of Justice has been heavily involved in court litigation to enjoin such state support wherever it has been detected and whatever form it might take.[3]

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[1] A description of the differing early reactions of long-established private schools or private school systems to the school desegregation decisions is contained in, Miller, Racial Discrimination and Private Schools, 41 Minn. L. Rev. 145 and 245 (1957).

[2] See, *e.g.*, *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961) aff'd 368 U.S. 515 (1962).

As late as 1973, the United States Supreme Court found it necessary to strike down a Mississippi law to the extent that it provided for text-books and transportation to students attending private, racially discriminatory schools, *Norwood* v. *Harrison*, 413 U.S. 455 (1973). And in 1974, the Court upheld another court order forbidding incidental state aid to private schools in Montgomery, Alabama. *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974).

More recently, on remand in *Norwood*, the district court imposed a certification process to determine which private schools were racially discriminatory and, therefore, ineligible for state textbooks and transportation aid. *Norwood* v. *Harrison*, 382 F. Supp. 921 (N.D. Miss., 1974). Large numbers of the nonsectarian private schools refused to submit themselves to court scrutiny through the certification process; some others which did were found to be racially discriminatory. (See discussion, infra, pp. 13–16). A similar state scheme for textbook and transportation aid in Louisiana was enjoined in *Brumfield and United States* v. *Dodd*, 425 F. Supp. 528 (E.D. La., 1976) (3-judge court), and a similar certification process imposed. Again, large numbers of nonsectarian private schools refused to submit certifications; and others which did were found to be racially discriminatory. In other litigation challenging the transfer of school buildings to "private" schools or other schemes of support, the United States has been successful in getting the transactions voided because the "private" school in question was found to be racially discriminatory. (See cases cited in footnote 3, p. 5, supra).

Many of the "private" schools involved in the above litigation are still in operation, and at the time of the trial of the above cases many of the private schools claimed to have and did have federal tax-exempt status.

B. The standards for Federal tax-exemption

The question of whether racially discriminatory private schools are entitled to federal tax-exemption under Section 501(c)(3) of the Code arose at approximately the same time as the state tuition-grant statutes were being contested. Previously, IRS had not considered the racial policies of a school in determining its entitlement to tax-exempt status. When the issue was raised, IRS suspended the granting of advanced assurances of deductibility pending a resolution of the question. On August 3, 1967, the Internal Revenue Service announced that "exemptions will be denied and contributions [to such schools] will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of the laws of the United States." Under this standard, a private school with an overt policy of racial discrimination could, nevertheless, obtain or retain federal tax-exempt status so long as the state was not unduly involved in the school's operation.

Under the 1967 IRS standard, the findings of the court decisions described above, which found specific "segregation academies" to be racially discriminatory, would not, even if fully accepted by IRS, necessarily have required the denial of federal tax-exemption to those private schools. For the courts, in contrast to the 1967 Service ruling, were not concerned with whether the state was so involved in the operation of the "private" schools that the operation itself amounted to state action subject to the limitations of the Fourteenth Amendment. The question in the above cases was only whether the state was providing assistance to what was conceded to be private discrimination at the "segregation academies." *Norwood*, supra, 413 U.S. at 464.[4] The above decisions would, therefore, not necessarily contain findings on the "state involvement" essential to a denial of tax-exempt status under the 1967 ruling of IRS. Consequently, a we have noted, many private schools which, in other contexts, had been adjudicated to be racially discriminatory retained their tax-exempt status.

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[3] See, *e.g.*, *Graham and United States* v. *Evangeline Parish School Board*, 484 F.2d 649 (C.A. 5, 1973); *United States* v. *Tunica County School District*, 323 F. Su[illegible] 1019 (N.D. Miss.) aff'd 440 F.2d 377 (C.A. 5, 1971). *United States* v. *State of Mississippi*, [illegible]9 F. 2d 425 (C.A. 5, 1974).

[4] In rejecting the defendants' claim that textbooks and transportation aid was too insubstantial to invoke a constitutional proscription, the Court said: "The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. 'State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.' *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). Thus Mr. Justice White, the author of the Court's opinion in *Allen*, supra, and a dissenter in *Lemon* v. *Kurtzman*, supra, noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional. *Lemon*, supra, at 671 n. 2." 413 U.S. at 464.

A considerable amount of scholarly debate followed concerning whether the above 1967 standard was adequate under the Code or the Constitution.[5] And a suit was initiated in 1969 by black citizens of Mississippi challenging the adequacy of the standard. *Green* v. *Kennedy*, 309 F. Supp. 1127 (D. D.C., 1970) (3-judge court). Prior to a final decision in the suit, however, the Internal Revenue Service resolved the issue by announcing on July 10, 1970, that "it [could] . . . no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes." The announcement was made a formal ruling and explained in more detail in Rev. Rul. 71-447, issued October 7, 1971. The 3-judge court in the above case initiated by Mississippi residents agreed with the Service's interpretation of the Code. *Green* v. *Connally*, 330 F. Supp. 1150, 1156 (D. D.C. 1971) aff'd sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971).

The procedures for implementing the general rule, however, at first required little more than a declaration by the private school that it did not discriminate in student admissions and a publication of that policy, at least once, in some local newspaper. The courts, in several subsequent cases where the United States was a party, found that the school's compliance with that procedure was inadequate to overcome the prima facie case of discrimination established against the school. *Norwood*, supra, 382 F. Supp. at 929; *Brumfield*, supra, 425 F. Supp. at 534-535; *United States* v. *State of Mississippi*, 499 F.2d at 434-435, fn. 17.

In an effort to tighten enforcement of Rev. Rul. 71-447, the Internal Revenue Service published on February 18, 1975 for public comment a proposed revenue procedure setting forth guidelines and recordkeeping requirements for determining whether private schools, seeking or holding federal tax-exempt status, have racially discriminatory policies as to students. 40 Fed. Reg. 6991 (Feb. 18, 1975). The proposed procedure was not specifically addressed to the problem of "segregation academies", but the Civil Rights Division of the Department of Justice commented on the proposed procedure describing ways in which the language of the proposed procedure could be interpreted or applied consistently with the standards used by the federal courts in determining whether a private school was racially discriminatory. (Letter dated March 21, 1975 from Assistant Attorney General of the Civil Rights Division to Commissioner of Internal Revenue Service, Additional Materials, Tab A).[6]

The final version of the above guidelines, which was published as Revenue Procedure 75-50, contained changes in language, however, which made several of the more important applications suggested by us difficult or impossible to justify. For example, we suggested that Section 2.02 of the proposed procedure would have required a school to have operated "continuously" on a nondiscriminatory basis. (Letter, supra, p. 4). In the final version of the procedure, published on November 6, 1975, Rev. Proc. 75-50, 1975-2 C.B. 230, Section 2.02 was changed to require only that ". . . since the adoption of that policy [of non-discrimination] it [the school in question] has operated in a bona fide manner in accordance therewith."

As a consequence of these and other differences in the court standards and IRS standards, some schools declared racially discriminatory by the federal court in *Brumfield*, supra, which was tried in part in 1975 and 1976, were nevertheless enjoying federal tax-exempt status.

When he assumed office, therefore, Commissioner Kurtz was faced with the anomaly that one federal agency—the Department of Justice—was seeking and obtaining court injunctions prohibiting any state aid to certain, specific private schools, because those schools were racially discriminatory, while the Service was continuing to provide the substantial benefit of federal tax-exempt status to those same schools under the standards then being employed by the Service. There can be no doubt that the anomaly should be corrected. Nor can there be any doubt that the appropriate way to correct the anomaly would be to conform the standards applied by IRS to the standards applied by the federal courts.

II. THE PROPOSED REVENUE PROCEDURE

The first effort by IRS to accomplish that transformation of its standards to specifically address the problem of "segregation academies" was published for public comment on August 22, 1978 (43 Fed. Reg. 37296). Our written comments of October

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[5] See, *e.g.*, Note, *Federal Tax Benefits to Segregated Private Schools*, 68 Colum. L. Rev. 922 (1968); Allen, *The Tax-Exempt Status of Segregated Schools*, 24 Tax L. Rev. 409 (1969); and Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 Tax L. Rev. 399 (1968).

[6] I have provided for the Subcommittee copies of each of the comments made by the Department of Justice through the Civil Rights Division on the proposed revenue procedures on this subject which have been published for public comment and request those additional materials be inserted in the record.

23, 1978 (Additional Materials, Tab B) and our presentation at the public hearing held by IRS on December 5, 1978 (Additional Materials, Tabs C and D) concerning that proposed procedure are contained in the Additional Materials submitted with this statement. Since a revised procedure was published on February 9, 1979 for further public comment, we will limit the direct comments here to the revised procedure.[7]

A substantial amount of criticism has been leveled at the proposed procedure. Some have claimed that a procedure addressed to this special problem is unnecessary. Others have claimed that the evidentiary standards used in the procedure are contrary to our legal tradition. Still others have said that the procedure is overreaching, while some claim the contrary—that the procedure is too flexible and under-inclusive.

We have considered each of the above criticisms and believe that each is either wrong or substantially overstated. Those who criticize the evidentiary presumptions and standards of the proposed procedure are misreading the applicable case law. Those who criticize the flexibility provided for application of the procedure are, in our view, making unrealistic demands for precision. Those who claim that there is no need for a special procedure are either unaware of or wish to ignore the historical background described above.

A. IRS needs a special procedure for the two categories of schools described

By its terms, the proposed procedure would apply to two categories of private elementary and secondary schools: (1) those schools that have been found to be racially discriminatory by the final decision of a court or government agency (i.e., "adjudicated schools"), and (2) those schools without a significant minority student enrollment whose formation or substantial expansion is related to public school desegregation in the community served by the schools (i.e., "reviewable schools"). (Secs. 3.02 and 3.03.) In other words, the procedure deals directly with schools which fit the factual patterns of the "segregation academies" described above. The propriety of singling out these two categories of schools for special scrutiny raises questions of fairness to the schools singled-out and efficiency in using limited resources for law enforcement, on which questions, as the agency responsible for enforcing the Internal Revenue Code, IRS's determination is entitled to great deference. In any event, we believe the historical circumstances described above demonstrate the clear need for the proposed procedure.

We assume that there is no serious dispute about use of the "adjudicated" school category. If a school has been adjudged racially discriminatory by a court or an agency, there can be no question that it would promote efficiency of law enforcement for IRS to focus its enforcement on such schools. Also, having had a full opportunity to present its case, the adjudicated school cannot legitimately claim any unfairness that special attention is focussed on it as a consequence of the adjudication.

But the schools formally adjudicated to be discriminatory constitute only a small portion of the "segregation academies" that have been established. As we demonstrate infra, pp. 19-23, the standards used by IRS in the proposed procedure to classify a school as "reviewable" are consistent with the standards used by the federal courts in determining whether a prima facie case of discrimination has been established against a particular private academy. Consequently, once a school has been properly classified as "reviewable" by IRS under the proposed procedure, the only difference between it and an "adjudicated" school is the happenstance of the school's involvement in a court or administrative proceeding. Therefore, it would be both unfair and inefficient law enforcement to focus solely on "adjudicated" schools and exclude "reviewable" schools from the procedure.

In addition, the court in *Green* v. *Connally,* 330 F. Supp. 1150, 1173 (D. D.C.) aff'd per curiam sub nom., *Coit* v. *Green,* 404 U.S. 997 (1971), ruled that private schools in Mississippi which were founded "at times reasonably proximate to public school desegregation" carried a "badge of doubt" concerning their eligibility for tax-exempt status. Accordingly, with respect to Mississippi private schools, the court stated that it was the duty of IRS to "seek out supplementary information, whether or not required for schools [located] elsewhere," before granting a final determination on their tax status. 330 F. Supp. at 1173. Under the current revenue procedures, the standards established by the court in *Green* v. *Connally,* supra, are applied only to Mississippi schools, Rev. Proc. 75-50, Section 8. The proposed procedure would apply the same or similar standards to similarly situated private schools in other states and would be consistent with the court's decision in *Green*, which stated:

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[7] Both the earlier proposed procedure and the current revision addressed the same two categories of schools. Therefore, our comments on that aspect of the earlier procedure would be equally applicable to the revision under consideration.

> "To obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class." 330 F. Supp. at 1174.

Thus, in addition to closely examining the operation of private schools which have been adjudicated to be racially discriminatory, the Service is amply justified in adopting a specific procedure for examining those schools which, pursuant to standards developed by the federal courts, are under "a badge of doubt". See *Norwood* v. *Harrison*, 382 F. Supp. 921 (1974), discussed infra. Moreover, unlike the more general provisions of Rev. Proc. 75-50, the proposed procedure would make it clear to the affected schools and to the public-at-large the factual circumstances that will trigger strict scrutiny of a school's policies and practices with respect to students.

B. The standards of the proposed procedure are consistent with the standards applied by the Federal courts

1. *Placement of Burden.* A major criticism of the proposed procedure that was published for public comment on August 22, 1978, was that it impermissibly placed on the affected schools the burden of proving that they were not racially discriminatory. Opponents of the procedure argued that such a requirement contravenes the traditional standards of due process; that is, that an accused is "innocent until proven guilty". We have previously stated our disagreement with such a claim. We presume that the same criticism will be lodged against the revised procedure; it too provides that in order for an affected school to establish its eligibility for tax-exempt status, the school must come forward with objective evidence to demonstrate that, notwithstanding its status, the school in fact has a racially nondiscriminatory policy as to students. (Secs. 4.01(b) and 4.02). However, we have closely examined the provisions concerning the allocation of burden and have concluded that the approach outlined in the proposed procedure is consistent with the burden-shifting principles applied by the federal courts.

The schools that are subject to the requirements of the proposed procedure will already have had a prima facie [8] case of discrimination established against them, either by a prior adjudication (Sec. 3.02) or by the objective facts of their formation and operation (Sec. 3.03). Secs. 4.01 and 4.02 provide that once a prima facie case of discrimination has been established against a school, the burden then shifts to the school to produce rebuttal evidence. That this is the proper evidentiary approach is clear.

On remand from the Supreme Court, in *Norwood*, supra, the district court ruled that "[o]nce plaintiffs have established a prima facie case of racially discriminatory admission policies as to a particular academy, the burden shifts to the school's representative to rebut an inference of racial disparity." 382 F. Supp. at 925. Accord, *Brumfield* v. *Dodd*, supra, 452 F. Supp. at 531, 532. *Cf. Hodgson* v. *First Federal Savings and Loan Ass'n*, 455 F.2d 818, 822 (5th Cir., 1972) ("[i]n discrimination cases the law with respect to the burden of proof is well-settled. The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendants to justify any disparities."); *McDonnel-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1972) ("[t]he complainant in a Title VII trial must carry the burden . . . of establishing a prima facie showing of racial discrimination. . . . The burden then must shift to the [defendant] to articulate some legitimate, nondiscriminatory reason for the [presumed discrimination]").

In the Supreme Court's landmark decision in *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1972), the Court noted that this burden-shifting principle is "not new or novel". Rather, the issue of how to properly allocate the burden of proof " 'is merely a question of policy and fairness based on experience in the different situations.' 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940)." 413 U.S. at 209. More importantly, the Court observed that "[i]n the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which 'fairness' and 'policy' require [school] authorities to bear the burden of explaining actions or conditions which appear to be racially motivated." Id. Given the existing case law, we believe that on the basis of fairness and sound administrative policy, the Service is amply justified in requiring schools which are subject to the proposed procedure to come forward and explain "conditions which appear to be racially motivated."

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[8] See discussion, infra, pp. 19-23.

2. *Establishing and Rebutting Proof of Discrimination.* The proposed procedure outlines standards that will be used to identify and deny tax-exempt status to those schools with a racially discriminatory policy as to students. (Secs. 3.03, 4.01 and 4.02). We have analyzed the standards, both for establishing a prima facie case of discrimination and for rebutting such a case, and have concluded that they are, in all essential respects, the same as legal principles which courts have applied in similar circumstances. Under those principles, the discriminatory nature vel non of a private school must, like that of a statutory program, be determined in light of " . . . its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its formation.' " *Reitman* v. *Mulkey,* 387 U.S. 369, 373 (1967).

Sec. 3.03 provides that a school will be treated as a "reviewable school," and thus subject to the requirements of the proposed procedure, if three characteristics are satisfied: (i) the school was formed or substantially expanded at the time of public school desegregation in the community served by the school, (ii) the school does not have a significant minority student enrollment, and (iii) if the school's formation or requisite expansion is related in fact to the desegregation of the public schools. (emphasis added). The procedure states that whether a school's minority enrollment is classified as "significant" depends "on all the relevant facts and circumstances" (Sec. 3.03(b)). Although the formation or substantial expansion of a private school at the time of public school desegregation will "ordinarily" be considered to be related in fact to public school desegregation, the proposed procedure provides that a final determination by the Service as to whether that criteria is met "must be based on objective evidence, taking into account all the facts and circumstances . . ." of each school. (Sec. 3.03(c).)

The standards set out in Sec. 3.03 are similar to the standards that the *Norwood* court, on remand, ruled were necessary to establish a prima facie case of discrimination. While cautioning that the quantum of proof required to establish a prima facie case of racial discrimination "is to be considered within the context of each case," 382 F. Supp. at 924, the court held that:

> "[F]or those private academies serving elementary and secondary grades, or both, which were established during the wake of massive desegregation orders of federal courts, we believe that a prima facie case of racial discrimination arises from proof (a) that the school's existence began close upon the heels of massive desegregation of public schools within its locale, and (b) that no blacks are or have been in attendance as students and none is or has ever been employed as teacher or administrator at the private school." Id. at 924-925.[*]

The court noted that the critical time of a private school's formation or unusual enlargement, though not necessarily decisive, "must be a significant factor" in determining whether it is racially discriminatory, 382 F. Supp. at 925, and stated that newly formed schools designed to serve students withdrawing from the desegregated public schools "may be legitimately considered as a factor in presuming that such schools [have] a racially restrictive admission policy." Id. See e.g., *Graham* v. *Evangeline Parish School Board,* 484 F.2d 649, reh. en banc den., 485 F.2d 687 (5th Cir., 1973); *McNeal* v. *Tate County Board of Education,* 460 F.2d 568 (5th Cir., 1971).

We would note that Sec. 3.03(b) states that a school will be considered to have a "significant" minority student enrollment, and thus not subject to being classified as a reviewable school, if its percentage of minority students is "20 percent or more of the percentage of the minority school age population in the community served by the school." Some opponents of the proposed procedure have argued that the provision imposes a "racial quota" which private schools are expected to meet. That assertion is simply not true. The 20 percent guideline (Sec. 3.03(b)) is only a factor that, if met, will, ordinarily, require no further inquiry, as to whether a private school should be classified as "reviewable". Such a use of racial statistics as an indicator of racial discrimination has long been endorsed by the Supreme Court. See, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 374 (1886); *Castaneda* v. *Patrida,* 430 U.S. 482 (1977). Moreover, the use of the 20 percent guideline as contemplated in Section 4.01(a) is only an evidentiary standard which, if met, will relieve the private school of the burden of producing evidence under the alternative standard for demonstrating eligibility for continued tax-exempt status. The failure of either an "adjudicated school" or a "reviewable school" to meet the percentage standard does not create an irrebutable presumption that the private school remains racially discriminatory; that determination will be made based on all the facts and circumstances. The school could still produce evidence as outlined in Section 4.03 to rebut the prima facie case or to show that it has taken appropriate measures to eliminate any continuing effects of its past discrimination.

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[*] Accord, *Brumfield* v. *Dodd,* supra, 425 F. Supp. at 531.

The third criteria necessary for a school to be classified as a "reviewable school" is that its formation or expansion must be "related in fact" to public school desegregation. (Sec. 3.03). Sec. 3.03(c) lists seven, non-exclusive factors that the Service will consider persuasive in determining whether this final criteria is met. We have analyzed the factors and have concluded that they are consistent with evidence which the federal courts have said is indicative of racial discrimination: (1) the opening or substantial expansion of one or more grades that are subject to public school desegregation, see *Coffey* v. *State Educational Finance Commission*, supra, 296 F. Supp. at 1391-1393; *Norwood* v. *Harrison*, supra, 382 F. Supp. at 928-929; (2) the enrollment of students who are drawn primarily from public schools, see *Brumfield*, supra, 425 F. Supp. at 535; *Graham* v. *Evangeline Parish*, supra, 484 F.2d at 650; *McNeal* v. *Tate County*, supra, 460 F.2d at 571; (3) the use of facilities formerly utilized by the public schools, see *Brumfield*, supra, 425 F. Supp. at 533; (4) membership in an organization that practices or advocates racial discrimination, see *Brumfield*, 425 F. Supp. at 533; (5) involvement by certain persons associated with the private school in efforts to oppose desegregation of the public schools, see *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817 (5th Cir., 1969); (6) discriminatory restrictive attendance areas, see *Brumfield*, supra, 425 F. Supp. at 533; and (7) the employment of faculty members who are drawn primarily from public schools subject to desegregation, see *Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F.2d 486, 491 (4th Cir., 1964); *Plaquemines Parish* v. *United States*, supra, 415 F.2d at 828; *Brumfield*, supra, 425 F. Supp. at 434-435; *Norwood* v. *Harrison*, 382 F. Supp. at 927.

Section 4.03 outlines examples of "actions and programs" which a school that is covered by the proposed revenue procedure may show to demonstrate that, notwithstanding its status, "the school, in fact, is operating on a nondiscriminatory basis and minorities are welcome at the school." Included in the section is the caveat that the level of evidence required to rebut a finding of discrimination "may vary from school to school and depends on the circumstances of [a particular] school." (Id.) The six categories of activities which are set out in Sec. 4.03 are among the objective evidence which federal courts have considered relevant to overcome a prima facie showing of discrimination. It is imperative that a private school produce objective evidence because the federal judiciary has "consistently rejected a private school's incantations that it does not discriminate simply because it has adopted a nondiscriminatory admissions policy." *United States* v. *State of Mississippi*, supra, 499 F.2d, n. 17 at 435 and cases cited therein.

In *Norwood*, supra, the court stated that rebuttal evidence may not be limited to "mere denials of a purpose to discriminate". 382 F. Supp. at 926. Rather, to be effective, the court said that the evidence must "clearly and convincingly reveal objective acts and declarations establishing that the absence of blacks was not proximately caused by such school's policies and practices." *Id.* The categories of activities outlined in Section 4.03 essentially parallel the affirmative steps which the court stated were illustrative of the kinds of efforts that a private school could undertake to rebut a finding of discrimination. The court stated that:

> "Illustrative steps of this type would certainly include proof of active and vigorous recruitment programs to secure black students or teachers, including student grants-in-aid, proof of continued meaningful public advertisements stressing the school's open admissions policy, proof of communication to black groups and black leaders within the community of the school's nondiscriminatory practices, and similar evidence calculated to convince one the doors of the private school are indeed open to students of both the black and white races upon the same standards of admissions." (emphasis added). Id.[10]

Thus, as demonstrated above, the standards proposed by IRS both for establishing a prima facie case of discrimination and rebutting such a case are completely consistent with the standards used by the federal courts.

C. The standards of the proposed procedure are appropriate and adequate to meet the problem

Opponents of the proposed procedure which was published for public comment on August 22, 1978, criticized the procedure as being both overly broad and/or too stringent. During our oral comments at the hearings held by the Service in December 1978, we stated that those concerns were apparently based, to a large extent, on a failure to appreciate the limiting effect of certain provisions of the proposed procedure defining its coverage. (See Additional Materials, Tab C, pp. 3-5 and Tab

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[10] Accord, *Brumfield* v. *Dodd*, supra, 425 F. Supp. at 532.

D, pp. 2–3). We expressed our belief that such concerns assumed a lack of flexibility which we did not see in the proposed general guidelines. (Id.) We did, however, make some suggestions for modifications which would make it clear that IRS retained the flexibility to deal with unusual factual circumstances (See Appendix A to Tab D, Additional Materials).

The revised procedure which was published on February 9, 1979 for public comment, in its format and language, went beyond any of the modifications suggested by us. We suspect that those changes will generate some complaint now that the revised procedures are too flexible. We do not share those concerns.

As the discussion above shows, we believe that the substantive standards used in the revised procedure are essentially the same as those used by the federal courts, and in that respect, there has been no substantive change from the earlier procedure published on August 22, 1978. Although the revised procedure is less automatic in its application, the fact that IRS is forthrightly addressing the question of "segregation academies" demonstrates, in our view, that the Commissioner intends vigorous, good-faith enforcement of the standards of the procedure. Particularly, we note that Section 7 of the revised procedure provides for National Office review of all decisions made under the procedure. Given the flexibility inherent in the revised procedure, we believe that National Office review is essential to uniformity in the enforcement of the procedure and will promote fairness in dealing with individual taxpayers.

III. CONCLUSION

In this statement we have assumed general agreement with the principle that private schools, whether sectarian[11] or nonsectarian, which are racially discriminatory as to students are not entitled under the Code to federal tax-exempt status. If there is disagreement on that point, we will be happy, on request, to provide the Subcommittee with a statement of the Department's position on that issue. Given that principle, however, the proposed revenue procedure is both necessary to focus attention and effort on the major problem area and adequate, with vigorous, good-faith enforcement, to accomplish the job. We believe the substance of the procedure is unexceptionable and should be implemented as soon as possible. We have in our past comments offered IRS the full support and assistance of the Department of Justice in effectively implementing the proposed revenue procedure, and we remain ready to provide such support and assistance when the revised procedure is published in final form.

ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD TO ACCOMPANY THE STATEMENT OF JAMES P. TURNER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

A. LETTER DATED MARCH 21, 1975 FROM ASSISTANT ATTORNEY GENERAL OF THE CIVIL RIGHTS DIVISION TO COMMISSIONER OF IRS COMMENTING ON PROPOSED REVENUE PROCEDURE PUBLISHED IN THE FEDERAL REGISTER [40 FED. REG. 6991] ON FEBRUARY 18, 1975

MARCH 21, 1975.

Hon. DONALD C. ALEXANDER,
Commissioner, Internal Revenue Service,
Washington, D.C.
(Attention of Director, Exempt Organizations Division).

DEAR MR. ALEXANDER: The purpose of this letter is to comment upon the proposed revenue procedure which the Internal Revenue Service recently published in tentative form in the Federal Register [40 Fed. Reg. 6991 (February 18, 1975)]. The procedure was designed to set forth "guidelines and recordkeeping requirements for determining whether private schools that are applying for recognition of exemption under sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954, or are presently exempt from tax, have racially nondiscriminatory policies as to students." We appreciate having the opportunity to comment upon your proposals for implementing the important federal policy of insuring that federal largesse do not aid private racial discrimination.

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[11] The Department of Justice has successfully defended agency termination of federal funds going to a school which claimed a religious basis for its racially discriminatory policies and practices. *Bob Jones University* v. *Johnson*, 396 F. Supp. 596, 606–08 (D. S.C. 1974) affid 529 F 2d 514 (C.A. 4, 1975).

This Department has been involved in substantial litigation concerning state aid to racially discriminatory private schools operating in public school districts undergoing desegregation pursuant to court orders in cases where the United States is a party. In many situations, the operations of such schools have impeded the orderly implementation of plans to desegregate the public schools. Our efforts through litigation have been to insure that the racially discriminatory schools are, and remain, private in fact and receive no aid or assistance through any arrangement from the state or its agencies. Similarly, we have an interest in the policies of other federal agencies which are designed to insure that such schools receive no aid or assistance from the federal government.

We believe that the proposed revenue procedure is a positive step toward implementing Rev. Rul. 71-447 and the overall federal policy of prohibiting governmental aid, whether by conferring tax-exempt status or otherwise, to private enterprises engaged in racial discrimination. While we realize that the revenue procedure is designed to be of general, national application, our experience with racially discriminatory private schools has been almost exclusively in the context of the formation and operation of the schools incident to the implementation of desegregation plans. Therefore, the comments in this letter concerning specific provisions of the proposed revenue procedure are addressed primarily to those circumstances. Also, our comments are based upon the assumption that the Service, to the extent that the standards are adaptable to its investigative and administrative procedures, will apply essentially the same standards in determining whether a private school is racially discriminatory as have been applied by the federal courts. In that connection, I have enclosed an attachment with this letter which briefly summarizes the standards established by the federal courts under the factual situations with which we have dealt.

The proposed revenue procedure addresses specific areas of school operation and places certain prohibitive and affirmative obligations on applicants for tax exemption. The areas covered are: (1) organization and operation, (2) other programs and activities incident to the operation of the school and (3) advertisement or other publicity of a nondiscriminatory policy and an inclusion of such a policy in appropriate governing instruments. Also, the procedure contains recordkeeping requirements and requires annual reports and specific information on initial applications for recognition of tax exempt status. Finally, the procedure sets out a process for filing complaints against a specific school and establishes sanctions for failure to comply with the guidelines and recordkeeping provisions. Since a complete assessment of many of the requirements of the procedure would involve considerations of administrative practicalities within the Service, we have limited our comments to the areas listed below and address only matters which might have some substantive effect on a determination of whether a particular school is racially discriminatory.

1. *Organization and Operation.* We have found that the most significant factor in determining whether a private school is, in practice, racially discriminatory, is the history of its formation and growth. Thus, private schools established or expanded at the time of public school desegregation having all-white student bodies and staffs have been considered racially discriminatory. It appears that Section 2.02 of the proposed Revenue Procedure incorporates this standard by requiring that "a school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that it has operated continuously in accordance with such racially nondiscriminatory policy." As we read this provision, a private school formed in order to avoid public school desegregation could not qualify for tax exempt status because it had not operated "continuously" with a racially nondiscriminatory admissions policy. If we are correct in our interpretation, we believe that this provision conforms with the decisions of the courts applying federal law as outlined in the attachment. Unless application of the proposed Revenue Procedure places proper emphasis on a private school's formation and growth, however, we would fear that many racially discriminatory private schools would be awarded tax exempt status by merely promulgating a pro forma nondiscriminatory admissions policy. It might, therefore, prove beneficial if the District Director's Manual contained guidelines that clearly defined the meaning of this provision so as to insure uniform enforcement.

Because of the critical importance of the date of a private school's formation in some circumstances, we believe that the requirements contained in Section 4 of the proposed Revenue Ruling pertaining to applications for tax exempt status should include a provision requiring the private school to disclose the date it was founded and began operation. In this context, on the Service's request with respect to specific application for recognition of tax exempt status, we would be pleased to provide you with the dates of implementations of desegregation plans, or other relevant dates, in school desegregation cases where the United States is a party and assist in obtaining such information concerning districts desegregating pursuant to agreements with the Department of Health, Education and Welfare or court-order cases brought by private litigants. Also, if you prefer to maintain such relevant dates in the District Director's Manual, we will assist you in any way we can in gathering the necessary information. The data provided by this information would readily identify those "suspect" private schools that were formed at the time of public school desegregation.

It is unclear whether the requirements contained in Section 4 apply to private schools which presently are granted tax exempt status. We have on some occasions in our school desegregation cases been involved in litigation with racially discriminatory private schools which claimed to hold tax exempt status granted under the previous procedures used by the Service, and we know of similar situations in school desegregation cases brought by private plaintiffs. If there is to be no general review of private schools granted tax exempt status under the previous procedures, we believe it would promote the federal policy against governmental aid to private discrimination to require private schools which have been granted tax exempt status since 1965 to submit all of the information required by the proposed procedure.

2. *Other Programs and Activities.* Other indici which can be examined to determine whether a school is racially discriminatory include segregated extra-curricular activities, discriminatory use of scholarship funds, and membership of the school or school officials in discriminatory organizations. The proposed Revenue Ruling appears to adequately cover extra-curricular activities and scholarship funds in Sections 3.04 and 3.05 while membership of school officials in discriminatory organizations is treated in Section 4(3)(b). Membership of private schools in an all-white athletic conference or an all-white private school association would appear to be encompassed with the language of Section 3.04 that a "school must be able to show that none of its facilities and programs permit or encourage racial discrimination." Any clarification to make that intent clear could, we assume, be handled by appropriate guidelines in the District Director's Manual.

3. *Complaints of Racial Discrimination.* It also appears that any questions that might arise concerning Section 5 could be resolved by appropriate guidelines in the District Director's Manual. There were two matters concerning that Section which we believe could have some substantive effect on the determination of whether a private school qualified for tax exempt status. As to the significance of a judicial or administrative determination that a private school does not follow a racially nondiscriminatory policy, it appears from decisions of the Supreme Court that the Service could be bound by a judicial determination that a private school is nondiscriminatory in a case where the United States is a party. See *United States* v. *Utah Constr. Co.*, 384 U.S. 393, 422 (1966); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 403 (1940). Accordingly, we can see no reason why the Service should not give the same conclusive and binding effect to a judicial determination that a private school is racially discriminatory in a case where the United States is a party. Of course, court decisions establishing that a private school is racially discriminatory in cases where the United States is not a party would not appear to be binding upon the Service. If that determination was made in an adversary proceeding, however, we can see no reason why it should not be binding on the private school. When information of such a judicial or administrative determination is communicated to the District Director, we realize that some investigation must be conducted to determine the issues presented and the context in which they were presented to the judicial or administrative body. Adequate guidelines in the Manual could set out the elements of an appropriate investigation for particular types of complaints. We will, of course, promptly inform the District Director and the Director, Exempt Organizations Division, of any relevant determinations in our school cases and of any other relevant information we obtain concerning racially discriminatory private schools.

In that regard we note that the proposed Revenue Ruling does not specifically address the issue of "umbrella" exemptions for private schools. Our experience has shown that many racially discriminatory private schools operate under the auspices of organizations that claim tax exemption on some other ground. We assume that complaints against such private schools will be processed like all others and that the Service will deal on a case-by-case basis with the question of what sanctions, if any, will be taken against the parent organization.

I hope that our recommendations and comments will be of assistance to you in finalizing the proposed Revenue Procedure. We will be happy to further discuss this matter with you at your convenience if you so desire.

Sincerely,

J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

ATTACHMENT

Since this Division has dealt with the question of racially discriminatory private schools almost exclusively in the context of state aid to such schools which are operating in public school districts undergoing court-ordered desegregation, the summary below is limited to the principles applied by the federal courts in those circumstances and the factual matters, concerning the formation and operation of the private school, which we and the courts have considered relevant in determining whether the private school is racially discriminatory.

The resolution by federal courts of the question of whether private schools are racially discriminatory schools has not required the application of any novel or unique principle of law. The character of private schools has been judged under the same evidentiary standards as have been applied to numerous other persons or institutions charged with racial discrimination.

The simplest case for a determination of racial discrimination can, of course, be made when a private school admits to a policy of excluding minority students. Some private segregated schools have such declared policies. However, it has been our experience that most officials of segregated private schools will not admit to such policies, and other evidence must be examined to determine whether the school is discriminatory. As the Tenth Circuit has said, "If proof of a civil rights violation depends on an open statement by an official of an intend to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." *Dailey* v. *City of Lawton, Oklahoma,* 425 F.2d 1037, 1039 (C.A. 10, 1970).

And the Fifth Circuit has ". . . consistently rejected a private schools' incantations that it does not discriminate simply because it has adopted a nondiscriminatory admissions policy." *United States* v. *State of Mississippi,* 49 F.2d 425, n. 17 at 435 (5th Cir., 1974), and cases cited therein.

Thus, a claimed open admissions policy is clearly insufficient, in itself, to establish the non-discriminatory character of a private school. Rather, the discriminatory nature vel non of a private school must, like that of a statutory program, be determined in light of ". . . its 'immediate objective', its 'ultimate effect' and its 'historical context and the conditions existing prior to its [formation].' " *Reitman* v. *Mulkey,* 387 U.S. 369, 373 (1967).

Under these principles, a significant factor in determining whether a private school is racially discriminatory is the history of its formation and growth. If the private school was established or substantially expanded at the time of public school desegregation, and the private school's attendance is all white and its staff all white, the courts have considered such schools to be racially discriminatory. For example, the Fifth Circuit in *Graham* v. *Evangeline* Parish School Board, 484 F.2d 649, 650 (5th Cir., 1973) made the following findings concerning the Evangeline Academy:

"From the record before us, it appears that Evangeline Academy is a racially segregated institution providing an alternative to the court ordered integration of Evangeline Parish public schools. Within one month of the District Court's desegregation order, Evangeline Academy was incorporated and operative. All of its students are white, and its opening resulted in a corresponding attrition of white students from the Parish's public schools."

And in *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (3 Judge) (S.D. Miss., 1969), in which the court struck down a state statute providing tuition grants to students attending segregated private schools, the discriminatory nature of these schools was determined from the conjunction of their establishment with the desegregation of area public schools.

"In the first school year in which the grant law was in effect (1964-65), two new, regular, nonsectarian private schools went into operation. Both were located in one of the four Mississippi public school districts which had undertaken that year to desegregate pursuant to court orders. During the 1965066 school year, twenty new private schools in which students received state tuition grants were added to the five that had been in operation in 1964-65. In each instance, the new schools opened in public school districts which either were under court order to desegregate or had submitted voluntary desegregation plans to the United States Department of Health, Education and Welfare." Supra, at p. 1391.

Finally, the *Norwood* court on remand established the following standard for proof of racial discrimination by private schools:

"[F]or those private academies serving elementary and secondary grades, or both, which were established during the wake of massive desegregation orders of federal courts, we believe that a prima facie case of racial discrimination arises from proof (a) that the schools existence began close upon the heels of massive desegregation of public schools within its locale, and (b) that no blacks are or have been in attendance as students and none is or has ever been employed as teacher or administrator at the private school." *Norwood* v. *Harrison,* (N.D. Miss, July 12, 1974, No. WC 70-53-K)

In addition to the history of the formation of the private school, there are other factors which can be examined to determine whether a school racially discriminates. Failure to employ minority faculty and staff members in areas where they are available for employment is one such indicia ehich was referred to in the *Norwood* opinion previously quoted. In *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389, 1393 (3 Judge), (S.D. Miss., 1969), the court also considered the absence of any contact whatsoever with any minority parents, pupils or contributors in the formation of the private school. Membership in an association of private schools, whose other member schools are racially segregated, indicates that the subject school is also racially discriminatory. Segregated extra-curricular activities have similarly been found indicative of racial discrimination. *United States* v. *State of Mississippi,* 499 F.2d 425, 430 (5th Cir., 1974). The fact that a private school has a discriminatory reputation in the minority community will tend to discourage applications by minority students and teachers, and should also be considered evidence of discrimination. Cf., *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245, 247 (C.A. 10, 1970); *Lee* v. *Cone Mills Corporator,* 301 F. Supp. 97, 102 (MD. N. C. 1969). A failure to offer available scholarship or tuition loan funds to minority students and membership of officers or founders of the private school in any organization whose purpose is to maintain segregated school education may also serve as evidence of racial discrimination. *Green* v. *Connally,* 330 F. Supp. 1150, 1176 (D.D.C., 1971).

In summary, a private school which claims to have an open admissions policy is nevertheless racially discriminatory if the school was established or expanded at time when area public schools were desegregating and if it enrolls no minority students and employs no minority staff. Other indicia of discrimination may include a discriminatory reputation in the minority community, membership of the school or officials in discriminatory organizations, segregated extracurricular activities and discriminatory use of scholarship funds.

B. United States Department of Justice October 23, 1978, Comments to the IRS on Proposed Revenue Procedure Published in the Federal Register [43 Fed. Reg. 37296] on August 22, 1978

Civil Rights Division, U.S. Department of Justice Comments to the Internal Revenue Service on Proposed Revenue Procedure on Private Tax-Exempt Schools

Summary

The Department of Justice endorses and strongly supports the proposed revenue procedure on private tax-exempt schools, published for public comment on August 22, 1978 (43 Fed. Reg. 37296). The requirements of the proposed procedure will enhance implementation of Rev. Rul. 71-447 and will significantly promote the overall federal policy of prohibiting governmental aid of any kind to private enterprises engaged in racial discrimination.

This Department has been involved in substantial litigation concerning state aid to racially segregated private schools operating in public school districts undergoing desegregation pursuant to court orders. In many respects the formation and continued operation of such private schools are sui generis; and, therefore, the Internal Revenue Service has ample reason to use special procedures and requirements in assaying the qualifications of a private school for tax-exempt status or continued tax-exempt status where the school was formed or substantially expanded under the circumstances covered by the proposed revenue procedure. The evidentiary presumptions and standards employed in the proposed procedures are consistent with those used by federal courts under similar circumstances in our litigation. Their use by the Service should, consequently, promote consistency in our respective treatment of particular schools.

We comment on this aspect of the proposed procedures in the General Comments, below, and we briefly discuss minor questions of interpretation in the Specific Comments, below.

General comments

The proposed revenue procedures are an amplification of Revenue Procedure 75-50. That procedure is generally applicable to all private schools and colleges. In commenting on it in its proposed form, we emphasized in our letter of March 21, 1975, ways in which the proposed language of Rev. Proc. 75-50 could be interpreted or applied to cover the particular circumstances of private elementary and secondary schools formed at or around the time of desegregation of the public schools. The new proposed procedure accomplishes that coverage much more directly and comprehensively. Moreover, unlike the more general provisions of Rev. Proc. 75-50, the proposed procedure should make it clear to the schools and to the public-at-large the factual circumstances that will trigger strict scrutiny of a school's policies and practices with respect to students.

The proposed procedure establishes three categories of schools: (1) schools adjudicated to be discriminatory, (2) reviewable schools, and (3) other schools. (Secs. 3.02, 3.03, and 3.04). Only the first two categories of schools would be automatically subject to the requirements of the proposed procedures. (Secs. 4.01 and 4.02). Schools classified as "other" would not, even if they had insubstantial minority enrollments, be subject to the requirements unless the particular circumstances justified such treatment (Sec. 5.04).

Since the mid-1960's, the Civil Rights Division of the Department of Justice has been involved in a substantial amount of litigation concerning "segregation academies".[1] That litigation has resulted in the adjudication of a substantial number of private schools as discriminatory, and where our litigation has not directly involved "segregation academies," we have been aware of the circumstances of the formation of such schools and their adverse impact on public school systems undergoing desegregation. Our experience has disclosed a fairly standard factual mold into which all such schools fit. Typically, the schools were formed when the implementation of some desegregation measure was imminent, either as a result of a court order or administrative action.

The group establishing the corporation or other organization to operate the school was composed only of white persons. That group and the persons solicited by them for enrollment were white persons opposed to desegregation of the public schools. The head master and faculty and staff initially employed were all white.[2] As of the dates our various suits were tried, the schools, in almost all instances, still had all-white governing boards, all-white faculties and professional staffs, and all-white enrollments. To the extent the schools participated in organized athletics, the competition was limited to other segregated schools. Contact with the black community, if it had occurred at all, was precipitated by our suit or other similar event.

Your categories of "adjudicated schools" and "reviewable schools" are broad enough to encompass virtually all schools of the kind described above, and the guidelines are flexible enough to permit any school that has been truly nondiscriminatory from its inception to qualify for, or to retain, tax exemption and advance assurance of deductibility of contributions. Your reliance upon objective facts rather than subjective statements of purpose, in determining whether a school ". . . will be considered by the Service to have a racially discriminatory policy as to students . . . ." is consistent with the approach of the federal courts and is amply justified by our experience in litigation concerning "segregation academies." For example, on numerous occasions in our litigation, private schools had adopted pro forma nondiscriminatory admissions policies and published them in order to qualify for federal tax-exempt status. Upon closer examinations of the objective facts surrounding the formation and continued operation of such schools, however, the federal courts found the avowed policies to be a sham, adopted solely for purposes of obtaining or retaining tax-exempt status, and understood to be such by the affected communities.[3]

By its terms, the proposed procedure applies automatically only to private schools which have already been adjudicated to be discriminatory (Secs. 3.02 and 4.01) or which were formed at or about the time of public school desegregation and enroll no minority students or an insignificant number of minority students (Secs. 3.03 and 4.02). As we noted, our experience is that all "adjudicated" schools will fit the typical factual pattern described above. "Reviewable" schools which do not meet your guidelines would likewise, almost invariably, fit that factual pattern. That factual pattern compels an inference that the school was formed and is operated for racially discriminatory purposes.

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[1] The government participated in early tuition grant cases, such as *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss., 1969); *Poindexter and United States* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967) (3 judge) *aff'd per curiam* 389 U.S. 571 (1968) and others, as well as in the more recent cases concerning transportation and textbook aid, such as *Norwood* v. *Harrison*, 382 F. Supp. 921 (N.D. Miss. 1974) (as amicus), and *Brumfield and United States* v. *Dodd*, 405 F. Supp. 338 (E.D. La. 1975) (3 judge). See also, other cases cited infra.

[2] In many instances, the head master and/or faculty and staff were composed of white principals and/or teachers who left the public schools to avoid having to teach in a racially integrated situation. See, *United States* v. *Tunica County School District*, 323 F. Supp. 1019, 1023 (N.D. Miss. 1970) *aff'd* 440 F.2d 377 (C.A. 5, 1971).

[3] E.g., *Norwood* v. *Harrison*, 382 F. Supp. 921, 929 (N.D. Miss. 1974).

Thus, the Service is amply justified in establishing a threshold level of minority enrollment (Secs. 4.01(1) and 4.02(1)) that such schools must meet in order to be exempt from further scrutiny under the procedure.[4] An "adjudicated" school which cannot meet the 20 per cent standard but which has made a good faith effort to correct the continuing effects of its past discrimination should have no difficulty meeting the alternative guidelines of Sec. 4.03. To the extent a "reviewable" school does not fit the typical factual pattern, it should automatically meet, or substantially meet, the guidelines for operation in good faith (Secs. 4.02(2) and 4.03) even if its enrollment of minority students falls short of the 20 per cent standard.

For example, if the school's governing board is not all white, it would meet Sec. 4.03(5)(f); if the school's faculty and professional staff are not all white, Sec. 4.03(4) will be met; if the student enrollment is not all white, Sec. 4.03(3) most likely would be met. To obtain minority students and faculty, a private school formed at the inception of desegregation of the public schools would have had to engage in recruitment of minority students and faculty as well as white students and faculty as required by Secs. 4.03(2) and 4.03(5) (a) and (b).

In other words, we do not view the factors set out in Sec. 4.03 as "affirmative action." The factors set out in Sec. 4.03 describe evidence which the federal courts have said is relevant to overcome the prima facie case of discrimination shown by the history of a school's formation and operation and the racial patterns of its enrollment and employment.[5] Since each school subject to the requirements of Sec. 4.03 will already have had a prima facie case of discrimination established against it, either by prior adjudication (Sec. 3.02) or by the objective facts of its formation and operation (Sec. 3.03 and 4.02), it is both appropriate and reasonable for the Service to require such schools to produce rebuttal evidence of the kind required by federal courts which have had substantial experience in dealing with these issues.

The private schools covered by the proposed procedure were not formed in a racial vacuum. To the contrary, they were formed at a time of racial transition in the public schools. All of the private schools involved in our litigation actively recruited white students and white teachers and professional staff, and they were formed and governed by white persons opposed to school desegregation. Section 4.03 describes actions that would have been taken by any reasonable person who wished to make it clear that his or her private school was not of the typical mold, that it was intended to be open to all rather than intended as a white enclave for those opposed to public school desegregation. In the rare instance where a private school has made substantial progress in the enrollment of minority students and/or employment of minority faculty and staff but can neither meet the requirements of Secs. 4.01(1) or 4.02(1) or satisfy four of the five factors set out in Sec. 4.03, the grace period allowable under Sec. 5.03 provides a reasonable leeway in which any school operating in good faith should be able to meet the requirements of Sec. 4.03.

In sum, the standards of evidence used in the proposed procedure, both for establishing a prima facie case of discrimination and for rebutting such a case, are, in all essential respects, the same as standards applied by the federal courts in similar circumstances. The adoption and enforcement of such standards by the Service would promote consistency in the treatment of such schools by the federal government and would be a commendable step towards eliminating any appearance of federal support of racial discrimination in any form.

Specific comments

We have only two minor questions concerning language in the proposed procedure. In Sec. 3.06, the second sentence should not be limited to a "court desegregation order." While interdistrict desegregation has most often occurred by court order, it could also result from state or other administrative action. We would suggest that the term "desegregation order or desegregation plan" be substituted for "court desegregation order".

In Sec. 4.03 we assume that all of the subparagraphs are qualified by the requirements of "good faith" and "non-discrimination." In our litigation, we have found that some private schools will enroll a token number of minority students and/or employ a token number of minority teachers but that further inquiry into their policies and practices shows that the action was a subterfuge to obtain some benefit or to avoid a finding of racial discrimination by the court. Where there is any indication of such a subterfuge by a school seeking to qualify under Sec. 4.03, we urge you to invoke the provisions of Sec. 2.05 to test the "good faith" of the school's claims.

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[4] The exemption from further scrutiny would not apply, however, under the circumstances noted in Sec. 2.05.

[5] E.g., *Norwood* v. *Harrison*, 382 F. Supp. 921, 926 (N.D. Miss. 1974).

Conclusion

Because we are in substantially complete agreement with the overall approach and the particular standards of the proposed revenue procedure, our comments have been brief. We reiterate, however, that we strongly support vigorous enforcement of the requirements and will provide you with such information and assistance as we properly can to facilitate prompt implementation of the procedure upon its publication in final form.

C. TRANSCRIPT OF ORAL COMMENTS BY DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, AT PUBLIC HEARING HELD BY IRS ON DECEMBER 5, 1978

The Department of Justice appreciates the opportunity to appear at this public hearing and to make a presentation in support of the proposed revenue procedures on private tax-exempt schools. We have previously filed written comments on October 23, 1978, expressing our wholehearted support for the purposes of the procedure and our agreement with the approach and standards utilized in the proposed procedure. We have reviewed some of the comments opposing adoption of the proposed procedure and wish to reiterate today our strong support for the efforts of IRS and to urge the adoption and implementation of final procedures as soon as possible.

Among the comments we reviewed, however, were some from persons or organizations who have normally supported civil rights initiatives but who expressed concern that the proposed procedures, as drafted, are overly broad. We believe that, to a large extent, those concerns are based on a failure to appreciate the limiting effect of certain provisions of the proposed procedure defining its coverage. Those concerns would likely be relieved by future interpretive rulings by the Service, but we believe that some of the concerns could also be relieved by minor modifications in the proposed procedures without undermining its effectiveness. While there will undoubtedly arise difficult questions in applying the general guidelines of the proposed procedure to specific cases, one of our basic disagreements with some of those opposing the procedure is that they assume a lack of flexibility which we do not perceive in the proposed general guidelines.

Because of the necessary limitations on the time for this oral presentation, we have provided our suggestions for modification, along with some other materials, as part of a written extension of these comments. We wish to emphasize, however, that our endorsement of the proposed procedure is not conditional on the wholesale acceptance of our suggestions.

In the time remaining, we wish to address very briefly and very broadly certain legal objections made to the proposed procedure and to compare certain factual claims about burdens imposed by the proposed procedure with the available facts from one of our cases concerning state aid to private segregated schools.

At the outset on the legal objections, I wish to note that they will ultimately be resolved by the courts in actual cases or controversies. Therefore, it would neither be helpful nor appropriate for the Department to engage in a detailed legal commentary on abstract questions. Two broad legal claims, however, can be broadly addressed. One is the claim that the proposed procedures are beyond the statutory authority of IRS, and the other is that the proposed procedures misapply the case law on racial discrimination.

The claim of lack of authority is contrary to the position of IRS dating from its announcement in July 1970 that "it [could] . . . no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination. . . ." That position of IRS is supported by court decisions both prior to and since the date of the announcement. I am aware of no successful challenge to that position or to Revenue Ruling 71-447 which initially implemented the position. We believe that Ruling is a correct interpretation of IRS's mandate.

The proposed procedure which is the subject of this hearing is, in our view, a logical and necessary step in enforcing Revenue Ruling 71-447. Those who claim that the proposed procedure is based on a misinterpretation of case law fail to recognize the difference between the articulation of standards in deciding specific cases and the drafting of general administrative procedures. Those who urge that IRS go no further than requiring a published statement of nondiscrimination fail to recognize that the Ruling, to be effective, must reach ingenious as well as ingenuous discrimination. Consequently, we believe that IRS has properly determined that its standards and procedures must probe beyond the avowed policies of the schools in question. That approach is completely consistent with the standards applied by federal courts in civil rights cases involving private segregated schools.

Some written comments, however, have claimed that the standards contained in the proposed procedure are too stringent and cannot reasonably be met even by private schools which have consistently operated on a nondiscriminatory basis. We do not imply that all such comments are misdirected. Indeed, some of our suggested modifications are designed to make it clear that IRS has the flexibility of considering and weighing certain factual claims raised by the written comments. However, facts available from one of our cases concerning state aid to private segregated schools indicate that some factual claims are inaccurate and that fears concerning substantial coverage of religious affiliated private schools may be unfounded.

For example, some of the written comments claimed that private schools could not reasonably be expected to meet the 20% guideline of the proposed procedure. In some instances the premise for such a claim was stereotypical assertions of the interests of or economic level of minorities as a group. IRS properly did not take such stereotypical considerations into account in adopting its guidelines. Moreover, available data on racial enrollments in religious affiliated schools in Louisiana show that black students constitute a substantial proportion of the enrollment of such schools, often exceeding overall the 20% guideline when applied to the public school enrollment in the individual parishes in the State.

On the coverage question, the data from our Louisiana case indicate that most religious affiliated private schools were not "formed . . . at or about the time of public school desegregation" as defined in the proposed procedure. Since the question of whether a school was "substantially expanded is dependent upon all the facts and circumstances," no categorical statement can be made at this time on that question. Nevertheless, the data indicate that the incidence of application of the guidelines to religious affiliated private schools will be less frequent than is apparently presumed in some of the written comments. Where the guidelines are applicable to such schools, some of the modifications which we have suggested could reduce any unnecessary friction incident to the application.

We believe IRS has properly concluded that the nondiscrimination requirement should apply to both sectarian and non-sectarian private schools. Our experience indicates that the legitimate concerns expressed in some of the written comments can be accommodated within the framework of the proposed procedure. We, therefore, urge that the proposed procedure, with any appropriate modifications, be adopted by the Service and implemented at the earliest possible date.

D. WRITTEN EXTENSION OF ORAL COMMENTS BY DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, AT PUBLIC HEARING HELD BY IRS ON DECEMBER 5, 1978

The purpose of this extension of the oral comments is to provide more detailed information or a more detailed discussion of three issues which could not be adequately covered in the time permitted for an oral presentation. The three broad matters addressed are: (1) possible modifications of the proposed procedure under consideration; (2) analyses of available data relevant to some factual claims in public comments to the proposed procedure; and (3) rebuttal to the assertion made by some that the 20% guideline of the proposed procedure is a "racial quota". The first two matters are addressed in detail in, respectively, Appendices A and B to this written extension. Summaries of those appendices, plus certain important caveats and qualifications concerning those appendices, are set out immediately below. Following those summaries is a discussion of the error we perceive in objections that have been made concerning the 20% guideline.

Appendix A. The possible modifications described in this appendix are only submitted for IRS's consideration and have not taken into account questions of administrative burden that IRS is in a better position to assess. As we noted, in our oral comments, our approval of the proposed procedure is not conditioned on the acceptance of our suggestions. For the most part, the modifications we have proposed simply make it clear that IRS has the discretion to consider the factual legitimacy of some claims, such as the contention that the guidelines, as drafted, are inappropriate for certain types of private schools. We think that discretion is implicit in the proposed procedure as it is now drafted when read as a whole. Therefore, we do not view our suggestions as making any change of substance, and IRS might legitimately determine to deal with unusual circumstances through case-by-case resolution as concrete cases in the application of the guidelines arise in the future, rather than modifying the guidelines at this time.

Appendix B. The analyses of data contained in this appendix are primarily addressed to two factual questions raised or implicit in some of the public comments.

One question arises from the claim that private schools cannot reasonably be expected to meet the 20% guideline because minorities as a group do not enroll in private schools in sufficient numbers. The other question arises from the apparent presumption underlying some comments which expressed concern that large numbers of church-related private schools would be covered by the procedure. We are aware of no factual data submitted to support either the claim or the presumption. The only data readily available to us relevant to the questions are derived from the record in a case concerning state support of private segregated schools in Louisiana, *Brumfield and United States* v. *Dodd.*

We recognize the limitations in using the data available to us and appropriate caveats are noted in Appendix B where our data are incomplete or otherwise subject to some limitation or defect. We believe, however, that the quality and comprehensiveness of the facts used is sufficient to show that the claim of a lack of minority enrollment in private schools is, at least in Louisiana, not well founded and to indicate that the concern that a large proportion of church-related schools would be covered by the procedure is not likely to prove-out in application of the procedure to specific cases.

Objection to 20 percent guideline. Some written comments have asserted that the 20% guideline used in the proposed procedure is a "racial quota" prohibited by the *Bakke* decision. We do not agree. The recent Supreme Court decision in *Regents of the University of California* v. *Bakke,*——U.S.——(No. 76-811, decided June 28, 1978), does not raise any question concerning the propriety of the 20 percent guideline as used in Sec. 3.03, Sec. 4.01(1) or Sec. 4.02(1) nor concerning the propriety of the factors which will show "good faith efforts" as described in Sec. 4.03. In *Bakke* the Supreme Court was concerned with what a majority viewed as a "racial preference" under which certain persons were admitted to a school and others, consequently, excluded because of their race. As used in Sec. 3.03, the 20 percent guideline is only an evidentiary standard for purposes of classifying a private school as "reviewable" or an "other school" (see Sec. 4.04). Such a use of racial statistics as an indicator of racial discrimination has long been endorsed by the Court (see *Yick Wo* v. *Hopkins,* 118 U.S. 356, 374 (1886), and more recently *Castaneda* v. *Partida,* 430 U.S. 482 (1977)) and is fundamentally different from the issue raised in *Bakke.* Similarly, the 20% guideline as used in Sec. 4.01(1) and Sec. 4.02(1) is only an evidentiary standard which, if met, will relieve the private school of the burden of producing evidence under the alternative standard for demonstrating eligibility for continued tax exempt status. The failure to meet the percentage standard does not create an irrebutable presumption that the private school is discriminatory. The private school can still produce evidence under Sec. 4.03 to rebut the prima facie case or to show that it has taken appropriate measures to eliminate any continuing effects of its past discrimination.

With respect to the factors described in Sec. 4.03, we noted in our written comments of October 23, 1978 that we do not view those factors as describing "affirmative action" or as creating "racial preferences". They are simply categories of objective evidence which the federal courts have considered relevant to overcome a prima facie showing of discrimination. Therefore, the procedure properly provides in Sec. 4.01 and Sec. 4.02 that a school, either because of a previous adjudication or because the private school comes under the unique factual circumstances described, "will be considered by the Service to be discriminatory . . ." absent objective evidence of a specified number of those factors. None of those factors on their face require a "racial preference", and the comments contending that the practical effect of the guidelines is to require a "racial preference" raise issues that can more properly be evaluated and resolved through application of the proposed procedure in concrete cases.

APPENDIX A

SUGGESTIONS FOR MODIFICATIONS IN THE PROPOSED REVENUE PROCEDURE ON TAX-EXEMPT PRIVATE SCHOOLS

In addition to the minor modifications suggested in our written comments of October 23, 1978, the Department of Justice believes that the following changes in the proposed procedure could be made to meet some of the concerns expressed by other persons or organizations without undermining the effectiveness of the procedure to deny tax-exempt status to racially discriminatory private elementary and secondary schools:

1. *Delete the reference to private colleges and universities in Section 2.04.* By its terms, the proposed procedure generally applies to private elementary and secondary schools. However, the proposed procedure also states that "in appropriate cases" the principles reflected therein "may" apply to "other types of schools." (Sec. 2.04).

The example given of a situation in which the proposed procedure "may" apply is "where a private college or university is adjudicated to be discriminatory." (Id.)

To the extent that the Service is able to identify private schools other than elementary and secondary schools (e.g., private schools having mostly vocational and/or technical programs) which have been adjudicated to be discriminatory (Sec. 3.02), or which by definition are "reviewable schools" (Sec. 3.03), we think the Service is amply justified in applying the principles of the proposed procedure to those schools.

On the other hand, our experience has not shown that there is a demonstrable nexus between the implementation of desegregation measures at institutions of higher education and the formation or expansion of private colleges and universities. Indeed, the factors set out in Sections 4.01, 4.02 and 4.03 describe evidence which the federal courts have said is relevant to establish or overcome a prima facie case of discrimination with respect to private elementary and secondary schools and which is to a large extent suit generis to schools at that level. Several of those factors could not be appropriately applied to undergraduate and graduate institutions. We believe that issues concerning such institutions could be more easily handled by individual revenue rulings. If the Service feels that specific guidelines are needed to govern the determination of the tax status of private colleges and universities, we believe that unnecessary confusion could be avoided by covering such institutions in a separate and distinct revenue procedure.

The modification suggested here could be accomplished by amending the second sentence of Section 2.04 to read as follows: "In appropriate cases, however, the Service may apply the principles reflected in this Revenue Procedure to other types of schools."

2. Amend Section 3.06 to provide greater flexibility in defining the relevant "community" to be considered in determining compliance with Sections 4.01 and 4.02. Section 3.06 now defines "community" to mean "the geographical area of the public school district within which the school is located, together with any other public school district from which the school enrolls at least five percent of its student body." Many of the public comments expressed concern that such a definition is overly broad, especially with respect to the operation of parochial elementary and secondary schools. For example, many churches observed that the racial enrollment of their affiliated schools reflect the racial composition of individual congregations which operate the church-related schools.

We do not know whether such claims are accurate but we believe that Section 3.06 could be modified to permit IRS to test the legitimacy of such claims or any similarclaims by adding the following language, or similar language, between the second and third sentences of Section 3.06:

"However, where a school can demonstrate to the satisfaction of IRS that a different definition of what constitutes the appropriate 'community' should apply with respect to its operation, the Service shall use that definition. In making such a showing, the school must establish that the considerations in determining the makeup of the community are to no extent based on race and that the school enrolls students exclusively from that community. The school must also provide an accurate breakdown of the racial composition of the community so defined acceptable to the Service."

Under this formulation, if a school were to claim that the relevant "community" with respect to its operation is a local church congregation, the school would have to establish that all students enrolled at the school are members of the particular congregation and, consistent with Revenue Ruling 75-231, that the congregation itself is not segregated because of discriminatory practices. In the absence of such proof, the Service would be justified in rejecting the proffered definition of community.

3. Modify Section 4.03 to permit a school to present, under limited circumstances, other evidence of "operation in good faith". One objection raised to the factors described in Section 4.03 was that some of them were not appropriate for certain religious affiliated private schools. It appears to us that most schools with any legitimate claim of that kind would not likely be covered by the procedure and that such rare instances of coverage that might occur could be more effectively handled on their specific facts as they arose. While we do not read the proposed procedure as denying IRS such flexibility (particularly given the provisions in the last sentences of Sec. 4.01(2) and Sec. 4.02(2) and the "grace period" provision of Sec. 4.03), the point could be made plain by adding a paragraph 6 to Section 4.03 in the following or similar language:

"6. A school which cannot satisfy four of the five factors listed above may justify such failure by presenting evidence that satisfies the Service that the factors not met are, for compelling reasons unrelated to race, not appropriate measures of the school's good faith. In such situations, the Service will consider other objective evidence that the school may present to show operation in good faith on a racially nondiscriminatory basis."

In addition, appropriate changes would have to be made in Sec. 4.01(2) and Sec. 4.02(2), such as adding to the end of the first sentence: ". . . or satisfying the requirements of paragraph 6 of section 4.03, *infra.*"

If such a modification is adopted the IRS should make it clear that, in order to guarantee uniformity of application, any determinations under paragraph 6 would be made by the National Office.

4. If modification 3, above, is adopted, delete the provision in Section 5.03 for a grace period. It was our understanding that the purpose of the grace period in the proposed revenue procedures was to provide IRS some flexibility in determining the tax-exempt status of any school which appeared to be making a substantial good faith effort to operate on a non-discriminatory basis but could not produce objective evidence of such an operation sufficient to meet the guidelines. If the flexibility to deal with such situations is written into Section 4.03 as described above, the "grace period" provision would become a redundancy. Or worse, because of its apparent redundancy, it could provide a means by which discriminatory schools could obtain delays in final determinations on their tax-exempt status. We do not believe any legitimate purpose would be served by the uncertainty that would necessarily arise from such delays.

APPENDIX B

ANALYSES OF AVAILABLE DATA IN THE RECORD OF BRUMFIELD AND UNITED STATES VERSUS DODD RELATED TO FACTUAL CLAIMS MADE IN PUBLIC COMMENTS

The following analysis of data in the record of *Brumfield and United States* v. *Dodd* is relevant to assessing the accuracy of the factual claims noted and/or the apparent assumption underlying some concerns expressed in public comments.

1. *Possible Coverage of Church-Related Schools.* Some written comments expressed concerns that were apparently based on the assumption that large numbers of church-affiliated private schools would be covered by the procedures.

a. *Description and limitations of data used.* Our analysis was limited to comparing the founding or formation dates of church affiliated schools with the respective date of the first desegregation plan or order in the parish where each such school was located. The proposed procedure states that, generally, a school will be considered to have been formed at or about the time of public school desegregation if it was formed within a period of one year before implementation of any initial to three years after implementation of any final desegregation plan or order (Sec. 3.03). Our analysis only separates the schools founded before the first desegregation order from all other schools. Therefore, one cannot conclude that the schools in the "all other" category would necessarily be covered by the procedure. Also, our analysis is based on the best information available to us at this time, and IRS might have other, different information before it at the time it makes the determinations on individual cases under the procedure. Consequently, it should be clear that the generalized analysis performed here is in no way binding on IRS.

In Louisiana, the local school districts are normally coterminous with the parish boundaries.[1] Data concerning the number of private schools in each parish were obtained from the Louisiana School Directory for sessions 1965–66 through 1975–76, which is issued by the Louisiana State Department of Education.

The dates of formation of church-affiliated private schools were obtained from the information reported on the "Certification and Background Information Form" which the schools filed as a result of orders in the *Brumfield* case. Since large numbers of nonsectarian private schools did not file forms, the information concerning schools formed after 1965–66 (other than church affiliated) was obtained from exhibits filed in the *Brumfield* case and would be accurate only to the date of preparation of those exhibits. Church affiliation was determined in the same manner as noted in 2a, below.

b. *Overview of data analysis.* The problem addressed by the proposed procedure is not racially discriminatory private schools in general but the more specific problem of racially discriminatory private schools "formed or substantially expanded at or about the time of public school desegregation" (Sec. 3.03). Insofar as formation of new schools is concerned, that is not a situation typically associated with the traditional church-affiliated private schools. A review of statewide data in Louisiana demonstrates the point.

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[1] There are two city school systems: City of Monroe, located in Quachita Parish and City of Bogalusa, located in Washington Parish. Only the parish systems were considered in our analysis.

Using 1965 as a privotal date,[2] there were approcimately 180 private schools formed after that date—only 19 were church affiliated.[3] By contrast, 327 of the 414 private schools operating in Louisiana before 1965-66 were church-affiliated and, therefore, would generally not have been formed at or about the time of a desegregation plan or order as defined by the procedure.

A more refined parish-by-parish analysis confirms that general impression. For this analysis, shown in tabular form in subparagraph c, below, all parishes were church-affiliated private schools operated in 1975-76 were analyzed. In Louisiana only 36 parishes have such private schools.[4] With the exception of Orleans Parish, the parish data were analyzed for church-affiliated private schools formed after 1963. Orleans Parish data were analyzed for such schools formed after 1955.[5]

In the 36 parishes, there were 293 [6] church-affiliated private schools and information on the dates of formation of 262 (89.4 percent) of those schools. Of the 262 schools on which there was information only 35 (13.3 percent) were formed after one of the above dates (i.e., after 1955 for Orleans and after 1963 for all others).

c. *Analysis of data by Parish.*

PRIVATE SCHOOLS 1975-76

Parish	Sectarian schools only		
	Total number	Number with available date of formation	Number formed after 1963*
Acadia	7	7	0
Ascension	2	2	0
Assumption	2	2	0
Avoyelles	5	5	0
Bossier	1	1	0
Caddo	16	15	3
Calcasieu	9	9	1
East Baton Rouge	23	21	6
East Carroll	1	1	0
Evangeline	2	2	0
Iberia	4	4	0
Iberville	2	2	0
Jefferson	37	28	2
Jefferson Davis	3	3	0
Lafayette	11	11	0
LaFourche	7	7	2
Morehouse	2	1	0
Natchitoches	1	1	0
Orleans	83	75	*14
Ouachita	7	6	1
Plaquemines	2	2	0
Pointe Coupee	1	1	0
Rapides	6	6	2
Sabine	1	1	0

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[2] Most court desegregation orders occurred after this date and, of course, administrative action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, was not authorized until approximately this date.

[3] Complete data for 1968-69 was not available and was not included.

[4] Eleven parishes have no private schools, and seventeen others have only nonsectarian private schools.

[5] Desegregation orders were entered in the *Bush* v. *Orleans Parish School Board* case in 1957.

[6] This number differs from the number for 1965-66 noted above because of closings and consolidations occurring between 1965 and 1975-76.

PRIVATE SCHOOLS 1975-76—Continued

Parish	Sectarian schools only		
	Total number	Number with available date of formation	Number formed after 1963*
St. Bernard	4	2	0
St. Charles	3	3	0
St. James	1	1	0
St. John Baptist	3	3	0
St. Landry	11	11	0
St. Martin	3	3	0
St. Mary	6	6	1
St. Tammany	8	7	1
Tangipahoa	7	4	0
Terrebonne	6	3	1
Vermillion	5	5	1
West Baton Rouge	1	1	0
Total	293	262	35

*For Orleans Parish only the number of church-affiliated schools formed after 1955 is noted.

2. *Minority Participation in Private Schools.* Some written comments asserted that the 20% guideline of the proposed revenue procedure cannot be met because minorities do not enroll in private schools in sufficiently large numbers.

a. *Description and limitations of data used.* In order to provide as accurate an analysis as possible, we utilized data with respect to student enrollment for the 1972-73 school year. The year 1972 was chosen because the racial enrollment statistics for students attending public schools in Louisiana, which provided the bases for determining the percent of black students a private school would have to enroll in order to meet the twenty percent (20%) guideline prescribed in Sections 4.01(1) and 4.02(1) of the proposed procedure, was derived from data contained in the Fall 1972 Directory of Public Elementary and Secondary Schools in Selected Districts, OCR 74-5, a publication of the Office of Civil Rights of the United States Department of Health, Education and Welfare. Information in the Directory is the most complete and comprehensive state-wide data available. The 1972-73 school year was also chosen because that is the first year for which comprehensive racial enrollment data is available with respect to students attending private schools in Louisiana. That data was reported on the "Certification and Background Information Form" which the United States District Court required each private school requesting state financial assistance to submit to the Louisiana State Board of Elementary and Secondary Education (B.E.S.E.).

With respect to the enrollment data available for private schools, almost invariably, parochial schools were the only schools to submit the required forms. Thus, our analysis reflects only the racial enrollment of parochial schools. We would add, however, that the failure of a school to submit the required form resulted in a determination by B.E.S.E. that the school was ineligible for state aid.

Finally, data concerning the number of private schools in a parish were taken from the Louisiana School Directory, Session 1972-73, Bulletin No. 1219, issued by the Louisiana State Department of Education. For our analysis, a school was designated as parochial if it had been listed as such in the Directory or if a review of the Certification and Background Form disclosed information supporting such a classification.

There are obvious limitations on use of the available data. First, prior to 1954 and for some time afterward, even church-affiliated private schools were racially segregated in Louisiana. We have no way of assessing the precise inhibiting effect that historical circumstance might have on present black enrollment in such schools. Second, some nonsectarian private schools with available racial data on enrollments were not considered in the analysis. Third, the analysis groups all of the schools together and should not be taken as implying that all of the individual schools had enrollments meeting the 20 percent guidelines. Some of the schools were virtually all black, some virtually all-white and others well integrated. The objection made, however, was to the overall participation of black students in private schools, and the analysis addresses that issue only. Fourth, to the extent certain written comments are correct that the "relevant community" for church-affiliated schools has a much lower black percentage composition, one would expect a lower involvement of black students in the schools analyzed than in schools which cater to the community at-large. Finally, the analysis is based on 1972-73 data rather than current data and subject to the other caveats noted in paragraph 1a, above.

b. *Overview of data analysis.* Given the limitations on the available data noted above, particularly the fourth point, the level of participation of black students shown by the analysis is remarkably high. A review of the data analyses in section c, below, reveals that during the 1972-73 school year, there were 425 private schools in Louisiana; 289 (68 percent) were religious affiliated. Enrollment data is available for 251 (86.8 percent) of such schools. Black enrollment in parochial schools ranged from a low of 0.26 percent in Evangeline Parish where data was available for all schools to a high of 48.8 percent in Plaquemines Parish where data was also available for all schools. On a state-wide basis, black students, on the average, constituted approximately 14.7 percent of the total enrollment of each parish.

The percentage of black enrollment a private school would have to meet in order to comply with the twenty percent (20 percent) guideline ranged from a low of 1.2 percent in St. Bernard Parish to a high of 14.9 percent in Orleans Parish. During the 1972-73 school year, on a parish-wide basis, the total black enrollment in private schools in 19 (52.7 percent) of the 36 parishes substantially met or exceeded the twenty percent (20 percent) guideline.

c. *Analyses of data by Parish.*

PRIVATE SCHOOLS (1972-73)

Parish	Total number of schools	Total number of parochial	Total number of parochial schools for which data is available	1972-73 percent black enrollment of parochial schools in column (iii)	1972-73 percent black enrollment needed to meet 20-percent guideline
Acadia	7	7	6	10.9	4.9
Ascension	4	2	2	3.4	6.9
Assumption	2	2	2	2.6	9.2
Avoyelles	8	6	5	22.2	7.7
Bossier	3	1	1	0.3	4.4
Caddo	31	16	13	24.3	9.9
Calcasieu	12	9	9	25.3	5.3
East Baton Rouge	29	19	19	16.9	7.7
East Carroll	2	1	1	1.4	16.1
Evangeline	4	2	2	.26	14.3
Iberia	5	4	4	14.6	6.8
Iberville	3	2	2	2.1	12.8
Jefferson	60	35	25	2.0	4.2
Jefferson Davis	3	3	3	4.7	5.3
Lafayette	15	12	11	30.8	5.0
LaFourche	7	7	7	2.0	3.0
Morehouse	5	3	1	100.0	11.6
Natchitoches	3	1	1	6.1	10.5
Orleans	114	83	75	27.5	14.9
Ouachita	11	6	5	28.6	4.8
Plaquemines	6	2	2	48.8	6.7
Pointe Coupee	6	3	1	17.2	14.2

PRIVATE SCHOOLS (1972-73)—Continued

Parish	Total number of schools	Total number of parochial	Total number of parochial schools for which data is available	1972-73 percent black enrollment of parochial schools in column (iii)	1972-73 percent black enrollment needed to meet 20-percent guideline
Rapides	8	4	4	4.3	6.9
Sabine	2	2	1	0	5.6
St. Bernard	5	4	2	0.3	1.2
St. Charles	3	3	3	6.7	6.8
St. James	2	1	1	1.4	12.6
St. John Baptist	4	3	3	14.2	12.9
St. Landry	15	11	11	30.0	7.3
St. Martin	5	4	*3	46.0	8.7
St. Mary	8	6	6	8.9	7.3
St. Tammany	9	7	7	2.2	4.6
Tangipahoa	12	7	4	1.8	9.6
Terrebonne	5	5	3	3.8	3.8
Vermillion	5	5	5	10.6	3.6
West Baton Rouge	2	1	1	6.8	12.3

*One parochial school closed in 1973-74

E. JULY 18, 1977, ORDER OF THE U.S. DISTRICT COURT IN BRUMFIELD VERSUS DODD, C.A. NO. 71-1316 (W.D. LA.)

Civil Action No. 71-1316, Section B

Oless Brumfield, et al. versus WILLIAM J. DODD, ET AL.

On December 13, 1976, this Court found the Plaquemines Parish Independent Schools to be racially discriminatory private schools and, therefore, ineligible to receive state assistance under the law enunciated in Norwood v. Harrison, 413 U.S. 544 (1973). The four schools which make up the Plaquemines Parish Independent Schools are: River Oaks Academy; McBride Academy; Delta Heritage Academy; Promised Land Academy. On January 12, 1977, this Court directed the defendants to collect all state textbooks from these schools and to cease providing the Plaquemine Parish Independent Schools with funds to operate a bus system.

Approximately two months later, on March 24, 1977, the Independent Schools were recertified by the defendant State Board of Elementary and Secondary Education as having, at that time, satisfied the Board that they were entitled to state assistance. The recertification of the schools by the Board was based on affirmative action taken by the Independent Schools in: 1. placing advertisements in local newspapers declaring the schools to be open to applicants without regard to race or color and stating that tuition scholarship aid would be available to blacks and other minorities; 2. alleged hiring of four black teachers; 3. alleged "preregistration" of sixteen black students for the 1977-78 school year under a recruitment effort by independent School employees with the help of parish officials. The United States and plaintiffs filed a Joint Objection to the giving of state aid to the Independent Schools in March, 1977. On April 20, 1977, the United States moved to add the Plaquemines Parish Commission Council as a party defendant to this action for the alleged purpose of enjoining any and all publicly provided transportation assistance to the private schools. It is the position of the plaintiffs and the Government that the Commission Council picked up the amount of state funds attributable to the transportation of private school students after this Court prohibited the State from providing them. They, therefore, contend that unless the Commiscion Council is joined in this case and ordered to cease paying transportation costs of the Independent School students, these students will continue to ride to school at public expense.

Thereafter, the Independent Schools requested and were granted an evidentiary hearing on the question of their present eligibility for state textbooks and transportation funds and the Commission Council participated in order to oppose their being made a party to the suit.

Having heard the testimony of witnesses and received into evidence pertinent documents, the question now before this Court is whether the Plaquemines Parish Independent Schools have proved that they are no longer racially discriminatory. We think that in order to prove this, the schools must have demonstrated to the Court that there is, in fact, a genuine non-discriminatory policy. The Court, however, feels constrained to find that they have not. Additionally, the Court is of the opinion that the Plaquemine Parish Commission Council should be joined as a party in this suit in order that the Court can give complete relief to the plaintiffs and the government.

Although the private schools claimed to have preregistered 16 black students for the 1977-78 school year, only five children have in fact been enrolled: four at Promised Land Academy and one at River Oaks Academy. McBride Academy has not preregistered any black students nor has it employed any black teachers. Delta Heritage Academy has not preregistered any black students but has employed one black teacher. River Oaks Academy has employed two black teachers and Promised Land Academy has employed one. However, it is significant to note that all of the black students preregistered to attend the private schools reside outside of Plaquemines Parish and all of these students are related to two of the black teachers recently employed by the private schools. It must be further noted that the evidence showed that in trying to recruit black children from Plaquemines Parish, all those who were contacted were contacted at least by one member of the Commission Council. In addition, of the parents contacted, in most of the cases, the father was employed by the Plaquemines Parish Commission Council and felt somewhat pressured to preregister their child. Forms were signed to preregister children. However, most of the parents signing believed that they were signing to indicate that they did not want their child in private school. Moreover, there was a strong emphasis on the fact that the private schools desired to enroll exceptional black children who would be starting fourth, fifth and sixth grades. It does not appear that only exceptional white children are enrolled or permitted to enroll at the private schools.

The evidence also shows the Plaquemines Parish Commission has been giving substantial public support to private schools. Part of this support consists of a program which has existed for a number of years whereby private school students and parents are employed on a part-time basis to earn money in order to cover tuition payments at the private schools. Commission checks are sent directly to the private schools, many not endorsed by the individual payees and in some cases the students earn just enough to annually cover their tuition expenses. The evidence is also clear that the Commission Council is using public funds to continue to operate buses which transport private school children. The Commission Council relies on the 1967 decision of the late Judge Christenberry, in U.S.A. v Plaquemines Parish School Board (no. 66-71A), permitting the School Board to expend money for the transportation of private school children as long as it did not interfere with transportation of public school children. However, this overlooks the fact that in 1973 the Supreme Court, in *Norwood* banned all state aid to schools found to be racially discriminatory, a decision Judge Christenberry could not have anticipated in 1967.

The Court was convinced by the testimony of numbers of black residents from Plaquemines Parish that the black community does not believe that the private schools have changed their attitude toward integration and the black community genuinely does not want to enroll their children in the private schools. This Court cannot enunciate, with exactitude, a formula which, if automatically followed, would ensure a finding that a once racially discriminatory school is no longer discriminatory. But the Court can listen to evidence and determine that a school has not convinced black residents in its community of its sincerety. The black residents of Plaquemines Parish believe that there is only an attempt being made to "use" a token number of black children in order to regain state aid. Surely, a token number cannot be sufficient to justify a finding of nondiscrimination. Apparently, too little has been done in too short a period of time and the Court feels that it would be an injustice to these people if it made a finding of nondiscrimination on the part of these private schools at this time. Accordingly, It is the order of the court that defendant, State Board of Elementary and Secondary Education be, and it is hereby, directed not to certify the schools of the Plaquemines Parish Independent School System at this time.

It is the further order of the court that the Plaquemines Parish Commission Council be, and the same is hereby, made a party defendant to this suit and, as such, is ordered to cease transportation of students who attend schools which belong to the Plaquemines Parish Independent School System.

EXCERPTS OF THE STATEMENT OF E. STANLEY RITTENHOUSE, LEGISLATIVE AIDE, LIBERTY LOBBY

(Full statement was made a part of the committee record)

TAX EXEMPT STATUS OF PRIVATE SCHOOLS

Mr. Chairman and Members of the Committee, I am E. Stanley Rittenhouse, legislative aide of Liberty Lobby. I appreciate this opportunity to appear today and present the views of Liberty Lobby's 25,000-member Board of Policy, as well as the approximately half a million readers of our weekly newspaper, the Spotlight.

Presumption of guilt and thus the presumption of intention are illegal. Well settled for eight centuries of Anglo-Saxon common law, plus being the thrust of our Constitution, it is still the law of the land and will remain so if this proposed revenue procedure on private tax-exempt schools is defeated.

The Internal Revenue Service (IRS) has become a dictatorial power all its own, holding in its hands the power of life and death over every tax-exempt private and church-related school in this country. With such awesome power which they have declared unto themselves, they in turn have become a separate government.

Their most recent decree as entered in the Federal Register demands that all tax-exempt schools bow the knee to the new Baal, IRS and its unelected bureaucrats. The children of Israel, Daniel, Shadrach, Meshach and Abednego never had it so rough with Nebuchadnezzar and his decrees. This time instead of being thrown into the lions' den, many of these private and church-related schools will be thrown into the fiery furance of bankruptcy.

Representative George Hansen (R-Idaho), protesting such action, declared:

"All schools formed or expanded at or about or after the implementation of desegregation plans in the respective communities will be presumed guilty of systematic racial discrimination and their tax-exempt status revoked retroactively. It proposes to make a blanket finding of racial discrimination and automatically harass all private schools, putting on its victims the onerous burden of proving their innocence. At the same time, it says that it will be practically impossible to refute the charge unless there is an affirmative action program operating.

"It obviously has the gravest conceivable implications for the survival of private schools and certainly gives the IRS wide scope for abuse and harassment . . . What is involved here is not actually a matter of racial discrimination, nor is it really a tax matter. Since the regulation explicitly includes church-related schools, and since there is nothing in the regulation that could not later be applied to churches themselves, what is involved is a very deep first amendment question."

The First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." In other words, there should be no hostility toward religion; the state cannot inhibit religion in any way. Not only should the government prevent a decreed state religion, it should also be neutral toward all religions by prohibiting inhibition and hostility of any and all religions.

Neutrality does not mean to prohibit but to allow the people to be free to do as they wish. The main thrust of the First Amendment is to maintain neutrality and prevent hostility. To prohibit is to be hostile.

If a school could not maintain its tax-exempt status, it would be forced to raise tuition, forcing many parents to send their children to public schools where the gods of secular humanism, evolution and the like are worshipped.

Karl Marx said, "Humanism is the denial of God, and the total affirmation of man . . . Humanism is really nothing else but Marxism." In the foreword to Witness, Whittaker Chambers called communism "man's second oldest faith. Its promise was whispered in the first days of the Creation . . . : 'Ye shall be as gods . . .' The communist vision is the vision of man without God."

It is apparent that the government desires to stop this growing trend of Americans educating their children apart from the socialism, the secular humanism of the internationalists. With Americans producing an ever-increasing segment of young patriotic, God-fearing leaders through these private and church-related schools, the liberal element in education and politics realize they will be met with greater resistance in the years ahead. From their point of view, this trend must stop. Thus the real issue is the preservation of their monopolistic power over the education of our young people. As the left-wing mass media seeks to control the minds of the adults, these regulations seek to control the education of the young.

These IRS rulings attack Christianity more than Christian schools. The new state religion (in violation of the separation of church and state) is secular humanism (man-worshipping-man). Prayer and Bible reading have now been removed from the public schools; the unelected bureaucrats are going after the private Christian schools.

The April 1979 newsletter of the Virginia Assembly of Independent Baptists says:

Several major reasons why these procedures should not be promulgated are:

1. IRS has no statutory authority to promulgate such procedures.

2. IRS is a tax collecting agency and should not be used to enforce social planning and change.

3. The First Amendment rights of every church-related school, guaranteed by our Constitution, will be violated.

But Godly people and their private schools must be in harmony with their religious beliefs, their principles, laws and foundations. This alone more than anything else brings them in conflict with the unelected federal government such as IRS.

IRS Commissioner Jerome Kurtz has stated that "our tax law places the IRS near the forefront in making delicate decisions involving definitions of 'religion' and 'church' and also places on the Service a substantial responsibility in making determinations relating to racial discrimination." This is far removed from collecting money, the sole purpose of the IRS. And these "determinations" will have the effect of law without ever going through the legislative process.

The U.S. Supreme Court has defined humanism to be a religion. In *Wisconsin* v. *Yoder*, attorney William B. Ball led the Amish to victory over humanistic public education. He pointed out that the court defines religion as "belief—not body, creed or cult." He argued that *Torcaso* v. *Watkins* makes it "quite clear that . . . theistic belief is but one sort of religion and that non-theistic belief may equally qualify as 'religion.' "

The tactics used in announcing these new regulations were deceitful. The IRS did not publish these very substantive regulations in the proposed rules and regulations section but buried them in the "notices" section of the Federal Register. Congress has insisted that rule making be done in the open. Once again, the unelected bureaucrats and the White House ignored (or confronted) the will of Congress in their unethical attempt to force their will on the people.

Representative Larry McDonald (D-Ga.) says:

"In my opinion, this is the first step in what could become a major assault on the tax exempt status of all churches and charitable institutions regarding any action the government decides is not "socially" desirable. Once the regulators possess the ability to take away the tax exempt status of churches and charitable organizations, they will have the financial lever they need to terminate those organizations who fail to comply with their dictates. They will be able to tax or not tax various programs simply by decree . . . This threatened expansion of federal power could greatly infringe upon the rights of all Americans to worship freely, and is an action which must not go unchallenged."

On what basis does IRS hang these discriminatory, persecuting, arbitrary rulings? On "public policy"—whatever that is. IRS Commissioner Kurtz has said that "we have almost no specific statutory guidance" but will use "public policy" in implementing these changes (that will have the effect of law). He pointed out that the IRS has constructed the "religious purpose" test of Sec. 501 (c)(3):

"Are the practices and rituals associated with the belief or creed illegal or contrary to clearly defined public policy? If a group's actions, as contrasted with its beliefs, are contrary to well established and clearly defined public policy, then tax preferences are inappropriate. The group will fail to meet the Religious Purpose test."

In other words, "public policy" will determine what one's religion should be and whether it will be tolerated as determined by the IRS. Has 1984 arrived in 1979?

An example of this floating standard comes to the surface with such words as "guidelines" and "community." How can something as vague as a "guideline" be the law of the land since it could be one thing to one school and be applied quite differently to another?

Sec. 2.03 states: "If a school engages in any acts or practices that are racially discriminatory as to students, the school is not entitled to tax exemption even though it may otherwise comply with the provisions of Revenue Procedure 75-50 or this Revenue Procedure." In other words, if there is any evidence that a school in fact has a racially discriminatory policy or practice the Service may find that the school is not entitled to exemption without regard to whether the school has complied with the guidelines set forth in this revenue procedure. If a school complies with these provisions, by what means, what other standard, do they determine that the school discriminates racially? Does IRS have a double standard, a double set of books? If so, why are they not included in this declared revenue procedure?

An example of this bizarre and incredible police state regulations certainly unsurpassed by the commissars in Moscow in their worst attempt to regulate schools is IRS's definition of "community": "The 'community' served by the school means the public school district from which the school enrolls a substantial percentage of its student body." In other words, "community" will be defined separately for each school and the appropriate percentage of minority students will also be determined separately.

Gentlemen, whatever happened to the 14th Amendment? The U.S. Constitution guarantees "equal protection of the laws." My personal concern is that if the IRS should get under the influence of a commissioner who is anti-Christian, these broad, vague, arbitrary rulings could make him an anti-Christ of the first order.

* * * * * * *

The preamble to our Constitution declares that the Constitution was ordained to "establish Justice and insure domestic tranquility and to secure the blessings of Liberty to ourselves and our Posterity." These rulings and guidelines—not laws written by the legislative branch—smack of anti-Christianity and will establish a conflict between the forces of Christ, the Christian schools, and those of the anti-Christ, IRS.

This certainly will not "insure domestic Tranquility," and will generate nothing by turbulence that will disrupt, divide and destroy our country.

Integration has been used as the vehicle to bring about this chaos. After years of experimentation, we find no benefits, no redeeming social value in busing and classroom integration. It has been demonstrated that neither the majority nor minority communities have gained. And to use skin color as sole determining factor as to who will be bused where is the most blatant example of racism ever practiced by our government.

Education itself suffers as the added stress of busing generates emotional harm within students, both white and black. There is also greater highway danger as the students spend needless hours on buses burning up fuel. The same federal government tells the people that fuel is or will be scarce and to conserve it. The whole mess defies logic, common sense, fairness and the Constitution. In the middle, students and their taxpaying parents suffer immeasurable harm and loss of their rights to self-determination for their lives and posterity.

As a Tampa Tribune editorial has pointed out, "The IRS proposal comes after private schools operated by religious organizations have won an impressive string of federal court rulings affirming their independence."

Since IRS is a creation of the legislative branch, and since you have the constitutional authority to do so, I urge you members of Congress to reject totally these proposed procedures and bring to a halt this usurpation of authority by IRS. Its decrees should not be the law of the land; your laws are.

Gentlemen, a constructive, positive approach to this whole mess is to have Congress order IRS to cease and desist immediately since even Congress does not have the authority to supersede the U.S. Constitution (First Amendment), let alone the IRS, a creation of Congress.

Thank you again for this opportunity to submit this statement for the record.

Statement of the Citizens for Educational Freedom

I am Robert Baldwin, Executive Director of Citizens for Educational Freedom. CEF is a nonprofit, nonsectarian, nonpartisan organization made up of parents concerned about the lack of educational choice in America. CEF is an organization that truly speaks for the parents of children attending the nongovernment schools. Although members are of virtually every faith and non-faith, CEF does not contend to speak for any institution or particular faith.

Among the concerns of CEF has long been the inability of poor and minority parents to choose to educate their children in a school outside the government school. Toward that end CEF has supported such legislation as Tuition Tax Credits, which this Administration has consistently opposed, as well as other methods to provide real choice to all parents in the education of their children.

Without going into great detail, this Administration might find that the easiest way to achieve free access to nongovernment schools might be to give the poor and minorities the economic freedom to choose the type of education they wish their children to have. One would suspect that if they were given this freedom that the need for any attempt such as the IRS ruling by the Administration would not be needed.

Although this may be the simplest method to achieve the goals of intergration, it is unlikely that this Administration will reach that conclusion. As such it is important to discuss the impact that this revenue ruling will have on freedom of choice in America, and the desirability of Senator Hatch's proposed bill's.

There is little question as to whether the Congress or the administrative branch of government, at the direction of Congress, has the authority to remove the tax exempt status of any categoty of organizations. Congress first passed the law giving various organizations that status and Congress can revoke that same law.

There is however, serious consideration that should be given to any authority of Congress or the Administration to determine that a certain segment of a broad category can be denied the status that it would otherwise be entitled to. It is precisely this point that is brought to focus by the IRS renenue ruling.

The revenue ruling in the first place segregates a particular group of organizations within the classification of 501(c)(3), nongovernment schools, and imposes some IRS defined 'public policy' to same, as a test of that organizations ability to retain its exemption. It would seem to many if some federal policy is of such importance that it must be applied to one segment of the 501(c)(3) code then it should be applied to all. The ruling is further complicated because the ruling does not take into consideration any religious convictions that schools may have.

For the most part the vast majority of the schools in question are connected in some way with an established church. Whereas one must be deeply concerned about the civil liberties of minorities one must be equally as concerned about the religious liberties of individuals and churches.

Whereas in theory the United States has always protected the liberties of all, it is well known that until recently there were some considered more equal than others. Fortunately that same occurrence did not happen in religious liberties. In order to protect those religious liberties the First Amendment to the Constitution of this land states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . ."

While equality of liberties is finally being granted to minorities, the granting of those liberties may not, without grossly violating the First Amendment, violate the liberties of others. Yet this revenue ruling could do just that.

CEF has no desire to protect those schools or individuals which seek to violate the civil rights of other in whatever capacity, for reasons of prejudice. CEF does feel however that if there are deeply held religious convictions that are held by a particular church or school that the IRS nor even the Congress has the authority to revoke a tax status that the church or school would be otherwise entitled to. While it is recognized that there may be some that would attempt to conceal meer bigotry under the guise of religious freedom, that the IRS ruling assumes that this will be the case in every instance. CEF feels that in a situation where this was the case that the burden of proof must lie with the prosecution in a court of law and the school be innocent until proven guilty. While there may still be some chance of religious tenets being ruled as invalid even under these conditions, that this would be a much more likely means of assuring that neither civil nor religious liberties are being abridged.

If a situation such as this were to arise and find it's way to court, and the court were to find that the religious body did indeed have a deeply held religious conviction regarding the situation, it is the belief of CEF that on the basis of the First Amendment that the State would have no authority to act against the school.

The above discussion is meant to include more than just the civil liberties of minorities. For CEF believes that the long range impact of the IRS ruling will be . . . that if the IRS is given the authority to more against this segment of tax exempt organizations that it will, by defalt, be given the authority to revoke any tax exempt status of any organization for any violation of some arbitrary defined 'public policy'. Whereas the schools that might find themselves truly in this conflict or race vs. religion (i.e. Jewish, Amish, certain of the Fundementalists) is small, there is a great likelyhood that should the IRS ruling be extended to include sex, as Arthur

Flemming, Chairman of the Federal Civil Rights Commission suggested in the House Oversight Hearings, that there would be many if not most religious schools in serious jeopardy. Truly the courts have ruled that it violates 'public policy' to discriminate on the basis of sex. Is it not possible that sex discrimination may be the next IRS defined 'public policy'.

Among the many reasons that parents have chosen to have their children educated outside the government schools has been an urgent desire to have their children receive the proper moral or religious education. Religion in this nation is extremely diverse. For the most part most Americans call themselves Christians. That however, is a deceptive notion. One only has to look at the number of different religious orders to realize that there are many different faiths under the broad category of "Christian'. Just because one sect of Christians hold to a certain set of beliefs does not mean that all sects hold to the same.

As a Baptist, I would not want my faith to be judged by a Methodist, or a Catholic. For that matter I would not want my faith to be judged as to right or wrong by an American Baptist, Southernbaptist, Free Will Baptist, etc. It was because of the recognition that a mans faith cannot be judged by any other man that ones freedom to that faith was guaranteed by the Constitution.

Just as there are many different sects of faiths there are parents who wish to educate their children according to the dictates of that faith. The IRS proposal, which attempts wrongly to assert one constitutional right over another constitutional right may well lead to the closing of many schools. Perhaps not many as a result of this particular issue, but as an extention of the asserted power of an unauthorized IRS. The closing of these schools would further limit the already limited choice that parents have to educate their children in schools other than government schools.

As a result of this concern it is the belief of CEF that the proposed revenue ruling should be withdrawn by the IRS. Should the IRS not do so, CEF believes that Congress must enact legislation that would prevent the IRS from taking any such action. At any case, CEF feels that the only way in which these already beleaguered parents and schools can be protected is to pass Senator Hatch's bill S. 449.

To avoid an extended discussion on the specifics of the revenue ruling or extended discussion of why CEF feels that 501(c)(3) is not a form of federal assistance I would like to submit for the record the testimony CEF prepared for the Oversight Hearings in the House.

I would like to conclude this testimony with the thought that the question before us is one of principle. The resolution of this question will have far reaching impact on civil and religious liberties in the future. It is the belief of CEF that the only way in which to avoid the possibility of any abridgment of our religious liberty is to deny the possibility of such a precedent that would do so. If one school or church religious freedom is abridged under the current ruling then all religious freedoms are likewise abridged.

James Madison; the father of the idea of religious freedom in America had much the same concerns. In his article Against Religious Assessments he wrote:

"Because it is proper to take alarm at the first experiment on our liberties, we hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late revolution. The Freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it."

CEF only hopes that Congress revers this lesson equally.

TESTIMONY ON THE PROPOSED IRS REVENUE RULING REGARDING NONPUBLIC SCHOOL DISCRIMINATION

Citizens for Educational Freedom is a non-sectarian, non-partisan organization made up of parents concerned about the education of their children. Our goal has always been to give every parent the right to choose the type of education that he wishes for his children, without financial penalty, whether he chooses a public school or a private school. Our concern no matter where the child goes to school is that the parent have considerable influence in the type of education that his child receives. Because of the growing power of the federal and state governments in relation to the local schools, parents are finding, to a larger and larger extent that, to have a say in how their child is educated they must send him to a private school.

To make this choice of conscience these parents undergo tremendous financial hardship. They must support one system of education through their taxes, and at the same time pay tuition for their own children's education. This choice may be for

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one of many reasons. They may have chosen because of quality education, or of lack of discipline in the public school or because of drug traffic, or they may have chosen because of a religious conviction. Those that have made their choice on the basis of religious conviction have no choice in deciding between a public school and one that teaches their own religious philosophy. To a parent, a child's education is a very important thing. They will not sacrifice that education to the promises of 'improvement'.

CEF's concern then as it relates to this revenue ruling is that this ruling will have the result of limiting the number of choices that a parent will have in educating his children and may even cause some parents to violate compulsory education laws in order to protect the education of his children, as a result of the closing of schools because of IRS action.

CEF has always taken the position that all parents should have the equal opportunity to choose the school for their children. This includes those who are in a minority. CEF does not condone discrimination on the basis of race and never will. In fact one of CEF's major concerns has been to allow more poor and minority students the opportunity of choice. However, we feel that the ruling in question goes far beyond any reasonable concern the IRS has in the policies of nonpublic schools.

The major objections that CEF has with the proposed ruling deal with the whole principle of the ruling. We wish however, to point out some of our objections the specifics of the proposal also. Frankly, we find that the ruling as a whole is absurd. Specifically, it would seem that the IRS takes its authority not from Congress but from its own administrative rulings. In Sec. 2.01 of the proposed ruling the IRS sights that a school must have a racially nondiscriminatory policy according to the authority of previous IRS revenue rulings. No other authority is sighted.

In Sec. 2.04 the IRS makes an assumption that is key to the entire ruling: "There are situations in which a school's formation or expansion at the time of public school desegregation in the community casts doubt on the existence of a bona fide racially nondiscriminatory policy. In such situations the mere assertion and publication of a nondiscriminatory may be insufficient evidence of a bona fide nondiscriminatory policy. *In these cases it is appropriate to examine whether actions have been taken by the school to overcome the indications that the school was established to foster racial segregation and that minorities are not welcome at the school.*" (Emphasis added.)

The assertion that any school started or expanded at or about the time of desegregation is an invalid assumption. As already stated, parents choose to send their children to private schools for many reasons and I suspect that few of them because of a desire to be segregated.

In Sec. 2.05 the IRS specifically excludes any organization exempt under 501(c)(3) from these guidelines except private secondary and elementary schools. If the IRS has determined that it must refuse to allow an organization tax exemption because of 'public policy', how can that agency select which of the organizations under 501(c)(3) must comply with the "public policy" and let others retain the tax exemption while violating the policy. The IRS is selectively enforcing what they determine to be law.

Sec. 3.01 defines what a nondiscriminating policy is to be. If the IRS is to enforce the definition in this section it would require an immense amount of supervision on the part of the IRS of every school in the nation. As this relates to religious schools, this would be, in my opinion, a classic example of "excessive entanglement".

Sec. 3.02 defines 'adjudicated schools'. Not only will schools that have been determined by the courts to be discriminatory be in this class, but also those schools who have been determined to be discriminatory by a federal administrative agency. Does this not mean that if IRS arbitrarily decides that a school is discriminatory then it would be adjudicated? The school is considered adjudicated upon the whim of an agency which has already assumed that every school that is started at or about the time of a desegregation plan is indeed discriminatory.

Under the guidelines of Sec. 3.03 all schools will be considered to be "reviewable" if they are started during the time of desegregation (from one year before the plan to three years after implementation of the plan); Sec. 3.03(c): "Ordinarily, the formation or substantial expansion of a school at the time of public school desegregation in the community will be considered to be related in fact to public school desegregation."

The IRS then lists seven indications that the school's expansion was not related to the plan. The first one states: "The students to whom the opening or substantial expansion of the school is attributable are not to any significant extent drawn from the public school grades subject to desegregation in the community served by the school."

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From where does the IRS think that students are fleeing the injustices of education? The other six indications the IRS has set forth would be so rare that they shouldn't even be considered. The IRS then lists seven indications that a school would be indeed discriminatory. These are more absurd than the first seven. Number ten (10) indicates that a school that rents a building from the public school will be discriminatory: "The school occupies or utilizes former public school facilities made available to the school in the course of implimentation of the public school desegregation plan."

Overall the text of the IRS revenue ruling is so flawed and frought with constitutional issues and administrative problems that it ought to be dropped entirely. If however these specific problems could be overcome, CEF would still stand against the attempt to expand the IRS's authority over private schools.

CEF's objection to the revenue ruling is based on principle. Our concerns are related to a number of questions that this proposal raises. Upholding of the legality of the IRS's action will pose serious threats to educational freedom and impede religious freedoms perhaps to the point of elimination.

In the first place, the First Amendment of the Constitution says, "Congress shall make no law respecting the establishment of religion nor the free exercise thereof . . ." Since the majority of private schools in this nation are or have been founded and run by a religious body, the IRS is treading on very thin ice in placing restrictions upon the policies of these religious schools. If these regulations were to impose upon any religious institution a hardship that caused them to close down that would be indeed an infringement upon their free exercise. Many of the schools in question will be incorporated under the original Church body and not a separate corporation. To deny the exempt status of one of these schools would be to deny that of the church as well. The financial condition of churches in this nation is such that were they required to pay taxes most would cease to exist.

The idea that is perpetrated by the IRS both in its ruling *and in its action* is that some IRS defined 'public policy' must take precedence over a religious conviction. The most recent example of this is the court case ***Bob Jones University*** **v.** ***United States of America***, 76-775, decided on Dec. 26, 1978. The case was a challenge by the University against the IRS's revocation of the University's tax exempt status. The IRS in the case indicated that they had the right to revoke the tax exempt status even though they admitted the University's racial belief was a genuine religious belief and not just a bigots prejudice. Judge Robert F. Chapman said in his opinion, "The Court finds and the *defendant has admitted* that plaintiff's beliefs against interracial dating and marriage are genuine religious beliefs." (Emphasis added.)

If this nation ever comes to the place that federal policy must in all cases take precedence to religious freedoms, then religious freedoms are a thing of the past. IR has acted in this ruling and in the Bob Jones case on what they determined to be federal policy. If IRS can do this with the race issue, why not sex, abortion or any other issue that arises in the future that might violate the religious convictions of a religious school. The issue here is not whether it is good federal policy to prohibit discrimination but rather does a nonlegislative body, such as the IRS, have the authority to determine federal policy and enforce that policy over the objections of religious convictions. Judge Chapman addressed this question in the ***Bob Jones*** case:

"Conflict with the Establishment Clause lurks within defendant's construction of the exemption provision because defendant puts no limit on its application. All religious organizations, such as plaintiff, are to be denied tax exemptions unless the IRS has judged the organization's purposes and practices to be in line with expressed federal policy. *Under the government's reading of the statute, only those religious organizations, whose purposes and practices are in harmony with those of the federal government, will be granted an exemption.* To preserve its exemption, a church, or other religious organization, such as plaintiff, would have to make sure it stayed in step with federal policy." (Emphasis added.)

An excellent example of this would be the IRS revoking the tax exempt status of a Catholic Hospital because it refused to perform abortions. While the IRS has carefully limited this ruling to private schools with the race issue, would not this ruling establish the precedence for federal policy revocations in future instances? The main concern here is the establishment of a precedent that might be expanded in later years. In his article Remonstration; Against Religious Assessments, James Madison addressed this issue:

"Because it is proper to take alarm at the first experiment on our liberties, we hold this prudent jealously to be the first duty of citizens and one of the noblest characteristics of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

I suggest that the only way to avoid the consequences of total abdication of religious liberty is to deny the IRS the principle of enforcing through the IRS code what they deem to be "federal public policy" over the religious liberties of various schools.

Another issue in this ruling that is raised also has serious consequences if the IRS ruling is allowed to stand. Is a tax exemption a federal subsidy?

Historically tax exemption has meant the organization in question is of such a nature that the government should not tax its activities. To construe that exemption is a federal subsidy that may be withheld for noncompliance with "federal public policy" raises serious problems beside those already mentioned above. Does this mean that it is a federal subsidy for one to keep any part of his income that is not taxed by the government? If so any parent who claims an exemption for a child on his income tax form is in receipt of federal aid and is subject to federal control of the way his child is raised. This may seem a little flippant, however, it's the principle that we must once again be concerned with. I do not think that the IRS has any intention of intervening in the affairs of the family, but once the precedent is established what is to keep some tyrannical bureaucrat in the future from trying to do so on the precedent of the exemption.

The courts have defined tax law to be taxation of income and not sanctions against illegal activity. In *Commissioner* v. *Tellier*, 383 U.S. 687 (1966) the court said:

"We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes."

There are two other questions of constitutional proportions that I shall just mention. From where does the IRS get its authority to bring about what amounts to legislation? And why must the burden of proof lie with the schools? The reasoning that I have heard in regards to the second question is that there are ample precedents that require the defendant in civil cases to bear the burden of proof. If this is true and these would be civil cases, then discrimination must not be a criminal offense. Conversely, if it is against federal law to discriminate, violations would be a criminal offense and therefor subject to the principle of 'innocent until proven guilty'.

In conclusion, parents who have chosen to send their children to a private school have done so at tremendous cost to themselves. To allow the IRS to arbitrarily revoke tax exemptions of schools for what they, and they alone, consider to be discrimination will place a further hardship on these families. For those schools that attempt to stay open, the tuition for such schools would be astronomical and few parents would be able to send their children to such schools. Those schools which attempt to meet the guidelines of the IRS will be under continuous scrutiny by same. This scrutiny may at some time compromise the position of the schools and therefore relegate them to the pits of those schools which the parents are running from. Parents who because of a conviction choose schools for their children may find it closed, leaving them with the option of violating their convictions and sending their children to a school not teaching the philosophy they wish, or violating the compulsory education laws of their state. CEF is compelled to take a position in opposition to this revenue ruling or any other that would establish precedents to restrict or violate either educational choices or religious liberties.

CEF hopes that this Congress sees the consequences involved here and will act accordingly. I close with the comments of James Madison in his "Remonstration" as he compared the powers of government with the liberties of the people:

"The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained, but more especially that neither of them be suffered to overlap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves."

STATEMENT OF DAVID I. CAPLAN

The fundamental problem with the proposed guidelines by IRS, creating the concept of suspected and thus "reviewable" schools, resides in the ability of IRS under these proposed regulations to find a private school to be "reviewable" merely on the basis of statistical evidence even in the absence of a single case where the school refused to admit an individual, qualified minority student.

There are many legitimate reasons why parents may wish to send their children to a private school coincidentally when a public school desegregation order becomes effective in their community. For example, it is well known that severe disciplinary problems arise in public schools when desegregation orders are imposed. See Third Report of the Temporary [New York State] Commission To Study the Causes of Campus Unrest ("Academy or Battleground"), Part I ("Secondary Schools"), Section II, "Secondary Schools 1971-1972—Movement of Students to Achieve Integration, Alternative Busing Proposal", pp. 35-36, 45:

"Members of the Commission are convinced that despite the apparent failure of busing, the people of our State cannot afford to lose sight of the original mandate of *Brown* [v. *Board of Education*] both in spirit and in letter. If busing has failed, we can and must create an atmosphere in which every child in our State has the opportunity for an equal education. * * *

"If busing has failed, that failure has resulted in a major cause of academic unrest; the chasms continue to grow; the fears continue to multiply; the incidents grow more numerous; the violence grows more violent. * * *

". . . [T]he busing which appears to have failed is the busing solely for the purpose of integration. * * *

"There is, however, little apparent confusion among the majority of those interviewed regarding what they feel to be the solution. To them, equal opportunity and quality education should be provided to the student irrespective of the community in which he lives, together with voluntary expanded enrollment rather than compulsory busing."[1]

Accordingly, parents in a community under a busing decree may have deep personal commitments in favor of civil rights for all but have even deeper personal commitments to the quality education of their children, the type of education which these parents perceive cannot be obtained for their childdren in public schools, particularly those under busing orders or other judicially mandated integration decrees.

The disciplinary problems in public schools under such orders stem from at least two sources: violence and the legal inability of public school officials to cope with that violence due to constitutional limitations:

"Busing for the purpose of integration in most cases takes youngsters from their own neighborhoods and customs and daily way of life. They are forced to spend the entire school day, a good part of their life, in an alien and strange atmosphere and way of life which, if only for that reason would appear hostile to the child." (Third Report of the [New York State] Commission, supra, 36)

Under the present state of the law, a public school may not remove a disruptive child from that school without notice, an explanation of the basis for the removal, and an opportunity for a hearing. *Jordan* v. *School Dist. of City of Erie, Pa.*, 583 F. 2d 91, 94-95 (3rd Cir., 1978); relying on *Goss* v. *Lopez*, 419 U.S. 565 (1975). The private school, by contrast, is not subject to the 14th Amendment and thus can legally more easily and quickly remove disruptive children to preserve a more disciplined atmosphere, the type of atmosphere which so many parents today increasingly believe is essential for learning.

Moreover, public school teachers and officials are under constitutional limitations against searching and seizing illegal drugs from their pupils, a limitation which is not true for private school teachers and officials. See, *People* v. *Flesch*, N.Y. Law Journal, March 12, 1979, p. 17 (Suffolk County); *People* v. *Horman*, 22 N.Y. 2d 378, 292 N.Y.S. 2d 874, 239 N.E. 2d 625; cert. den. 393 U.S. 1057, 89 S.Ct. 698, 21 L. Ed. 2d 699. Cross-busing orders, particularly of middle-class pupils into unfamiliar "ghetto" areas, thus can raise the spectre in the minds of middle-class parents of a drug problem which cannot be handled in the new receiving school. Accordingly, private schools can more easily offer the attraction of a drug free environment for their pupils than can public schools, certainly an important and legitimate consideration in sending children to private schools.

Recent articles in the press, for example, emphasize the racially neutral grounds for the expansion of private school enrollments:

"Donald Barr, headmaster of the Hackley School in Tarrytown [New York], said that during his 10 years as head of the Dalton [private] School in Manhattan, 'most of our students were there because their parents felt they had no other place to go.' Mr. Barr, who left Dalton for Hackley in 1975, cited crime, population shifts and a decline in the level of public education for having convinced many parents to send their children to private schools. Now, he said, 'the parents are not running from integration and there's little crime' in the 50-mile radius of his mid-Westchester [County] school. 'The parents are just unhappy with the public schools,' he said.

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[1] One member of the Commission commented: "What have we come to in this city [of New York] when a child cannot go to the toilet for fear of being beaten?" [Third Report of the Temporary Commission, supra, at p. 173.]

"These parents cite lower standards in once-excellent schools or a perceived failure of the schools to deal with children unable to maintain the academic pace. They also speak of school districts that have been forced, by the voters or high costs or both, to eliminate the special programs and activities that once made them distinctive." [James Feron, N.Y. Times, March 23, 1979, p. 1 ("Parents in Suburbs Are Turning Increasingly to Private Schools"), at col. 3.]

And:

"Parents in the Metropolitan Area's suburbs are switching their children from public schools to private schools in droves, an official of the National Assn. of Independent Schools said today.

"The trend is due partly to unhappiness over curtailed programs and unruly conditions in some suburban public schools and partly to the advantages of individual attention that private academies offer, according to the NAIS.

" 'I don't think the trend has anything to do with fears of integration,' said Thomas Wilcox, an NAIS spokesman.

" 'But order and discipline do play a role. These are not a problem in our schools. We're able to choose the students.' " [Cy Egan, N.Y. Post, March 23, 1979, p. 11, col. 1 ("Private School Rolls Soar in Suburbs").]

Under all these circumstances, it is thus to be expected that those parents who hold certain strong but legitimate beliefs and concerns over the disciplinary atmosphere which they perceive as essential in schools for their children would shift the children to private schools when a desegregation order hits the community, simply by coincidence of a complex of factors of legitimate parential concern. While the same may be said for both minority and non-minority parents, the question remains whether the same is in fact true, and thus whether the private schools have expanded their non-minority enrollment simply because the minority applicants (if any) did not satisfy academic requirements (having been enrolled in academically inferior segregated schools) or were unwilling or unable to meet the required financial payments, thereby accounting for the differential rise in non-minority enrollments predominantly in private schools. Accordingly, under these circumstances, the caveat of the U.S Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1854, 1856–1857, is of crucial importance:

"[Statistics] come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the circumstances." [Cited approvingly in *Hazelwood School District* v. *United States*, 53 L.Ed. 2d 768, 780 (1977).]

The Supreme Court has also held that the particular desires of minority teachers in an employment discrimination case, as contrasted with the desires of non-minority teachers, regarding desired districts where they prefer to teach, are of crucial importance in such a case, *Hazelwood School District* v. *United States*, supra, 53 L. Ed. 2d 768, 779–780 (1977), in order to determine whether the statistical disparity in minority vs. non-minority hiring of a given school district was racially discriminatory, as opposed to being a mere reflection of the contrasting desires as to employment sites of minority vs. non-minority teachers. Similarly, the disparities in the choices of parents who send their children to private vs. public schools most likely exist between non-minority vs. minority parents for many private reasons.

Moreover, in many cases statistical evidence of discrimination must be bolstered with evidence of "specific instances of discrimination." *Teamsters*, supra, 97 S.Ct. 1854, at 1856. Under these circumstances and considerations, it is mandatory that, in order to subject a private school to the "reviewable school" status of the proposed IRS procedure, these guidelines should require an added showing of some individual cases of actual refusal by the private school to admit a minority applicant of equal or better qualifications than those non-minority pupils who were actually admitted. The required test of illegal public school segregation under the 14th Amendment of the U.S. Constitution mandates a "showing that this condition resulted from *intentionally segregative actions* on the part of the [school] Board." *Dayton Bd. of Educ.* v. *Brinckman*, 433 U.S. 406, 413 (1977) (emphasis added).

Six members of the U.S. Supreme Court are on record that this requirement of a finding of intentionally segregative actions in turn requires "findings as to the motivations of the multi-membered public bodies." *Board of Ed. of City of New York* v. *Califano*, 584 F. 2d 576, 577 n.2 (2nd Cir., 1978) (cert. granted), citing *Dayton*, supra, 433 U.S. 406, 414. Accordingly, private schools, which are not subject to the strictures of the 14th Amendment, may not be held to any more stringent a test of illegality. Yet the proposed IRS procedure attempts to do just that, and is therefore illegal.

TESTIMONY OF THE REV. DR. CHARLES V. BERGSTROM, EXECUTIVE DIRECTOR OF THE OFFICE FOR GOVERNMENTAL AFFAIRS, LUTHERAN COUNCIL IN THE USA

I. INTRODUCTION

Mr. Chairman, I am pleased to have this opportunity to submit testimony on the Proposed Revenue Procedure Affecting Private, Tax-Exempt Schools. The Lutheran Council in the USA has been actively involved in the discussions of this issue and is encouraged that the Senate Subcommittee on Taxation has scheduled public hearings to further address the questions raised by the revenue procedure.

My name is Dr. Charles V. Bergstrom. I serve as the Executive Director of the Office for Governmental Affairs, Lutheran Council in the USA, located here in Washington, D.C. My testimony is supported by three member church bodies of the Lutheran Council:

The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,800 congregations having approximately 2.4 million U.S. members;

The Lutheran Church in America, headquartered in New York City, composed of 5,800 congregations having approximately 2.9 million members in the U.S. and Canada; and

The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 250 congregations having approximately 110,000 U.S. members.

In its Thirteenth Annual Meeting held in Minneapolis, Minnesota, on May 15 and 16 of this year, the Lutheran Council in the USA adopted the following public policy recommendation on the issue of the Internal Revenue Service and Private School Desegregation. The recommendation and preliminary statement serve as a foundation for the testimony which I am submitting today.

Public policy recommendation: IRS and private school desegregation

A religious organization, as other organizations otherwise entitled to a tax-exempt status, cannot claim the exempt status and at the same time operate contrary to established public policy on racial nondiscrimination. Withholding or withdrawing of the tax exemption by government must be based on an organization's racially discriminatory policy or practice determined on facts within a framework of due process. Presumptions on general circumstances or external conditions are inadequate for this purpose.

On August 22, 1978, the Internal Revenue Service issued a Proposed Revenue Procedure on Private Tax-Exempt Schools. The Proposed Revenue Procedure set forth guidelines which would be used by IRS to determine whether such schools are operated on a racially discriminatory basis and whether they are entitled to tax exemption under Section 501(c)(3) of the Internal Revenue Code. On December 5, 1978, the IRS held hearings on the Proposed Revenue Procedure. At that time, Lutheran church bodies presented testimony opposing the Proposed Revenue Procedure. On February 9, 1979, the IRS revised its original proposal. The revised Revenue Procedure is a reasonable procedure for dealing with racial discrimination by private schools. It may have been unnecessary, but it is not objectionable.

Recommended: That the Lutheran Council urge the participating churches to support the withholding or withdrawing of tax-exempt status of organizations which, in fact, have a policy or practice of racial discrimination.—As adopted by the Lutheran Council in the USA, May 16, 1979.

II. STATEMENT ON RACIAL JUSTICE

In its commitment to the advancement of love, justice, and mercy for all human beings, the Lutheran church condemns racial discrimination and supports all efforts—including those taken by the civil government—to promote racial justice. The American Lutheran Church, Lutheran Church in America, and Association of Evangelical Lutheran Churches have strongly and affirmatively advocated increasing minority membership in all aspects of church life, including educational opportunities supported by the church. For instance, overall minority enrollment in the 54 Christian Day Schools supported by the American Lutheran Church congregations is approximately 25 percent. Included with my statement are copies of documents reflecting commitments to voluntary "affirmative action" by these Lutheran faith communities. I request that these church statements become part of the record.

The Lutheran church recognizes and supports the intent behind the proposed IRS procedure—to respond to the serious problem of "white flight" private schools founded solely for the purpose of circumventing local desegregation plans. However, in attempting to deal with this problem, a careful balance must be struck by the Federal government so that non-discriminatory, "innocent," private institutions are not subject to undue government interference and costly, time-consuming Federal

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regulations which unnecessarily challenge the lawful existence of the private school, and which may ultimately contribute to its demise.

III. REGULATION OF RELIGIOUS ACTIVITY

Although the Lutheran Council's reactions to the revised revenue procedure are generally positive, the Council remains concerned over the disturbing trend in recent Federal regulatory actions affecting the church community: extremely narrow and inflexible IRS definitions in 1976 and 1977 of the term, "integrated auxiliary" of a church; June 1978 IRS restrictions on the "political education" activities of all tax-exempt organizations; attempts by the National Labor Relations Board to win jurisdiction over church school teachers; an April 1978 ruling by the Department of Labor requiring church-sponsored schools to pay unemployment insurance taxes because the government states that their employees' activities are not "religious"; and the proposed procedure which we are addressing today which, although altered somewhat from the August 1978 version, still establishes additional guidelines and record-keeping requirements which become roadblocks to small voluntary groups and organizations.

Many church leaders consider these actions, when taken together, to be an unprecedented intrusion by the Federal government into religious affairs and consequently represent a major challenge to religious liberty in this country. Therefore, you can understand our appreciation for these hearings to review the authority of IRS guidelines as well as the rights of religious schools.

IV. COMMENTS ON PROVISIONS OF REVISED REVENUE PROCEDURE

The Lutheran Council is, on the whole, pleased with the amended definition of "reviewable schools" as it appears in the February 9, 1979 revision to the Proposed Revenue Procedure on Private Tax-Exempt Schools. As I noted earlier in my statement, the intent of the entire procedure is related to the definition of "reviewable school." The Lutheran Council commends the Service for deleting the rigid and arbitrary 20 percent minority enrollment test and substituting the words "significant minority enrollment" in its place. It is also heartening to read in Sec. 3.03(b) of the revised procedure that in determining significant minority enrollment, "Consideration will be given to special circumstances which limit the school's ability to attract minority students, such as an emphasis on special programs or special curricular which by their nature are of interest only to identifiable groups which are not composed of a significant number of minority students, so long as such programs or curricula are not offered for the purpose of excluding minorities."

The addition of a third element to the definition of "reviewable school"—that the creation or substantial expansion of a private school was related in fact to public school desegregation in the community also relieves some of the burden of prima facie guilt presumed under the original procedure. In clarifying whether the formation or substantial expansion of a school was not related in fact to public school desegregation, the revised procedures go on to list seven pertinent facts which may vindicate the private school. Fact number six states that a private school could be exonerated from the charge that its formation was related in public school desegregation if: " The school was formed or expanded in accordance with long-standing practice of a religion or religious denomination which itself is not racially discriminatory to provide schools for religious education when circumstances are present making it practical to do so (such as a sufficient number of persons of that religious belief in the community to support the school), and such circumstances are not attributable to a purpose of excluding minorities.

In interpreting this element of the procedure, it would be helpful to the religious community if further clarification was made by the IRS as to what constitutes a "long-standing practice of a religion or religious denomination." What guidelines will the IRS use to interpret this definition?

The Lutheran Council's objections to the original procedure also focused on the definition of "community." Our objections related directly to the definition of "reviewable school" and the link between the 20 percent minority enrollment test and the definition of the community served by the school. The amended definition of "reviewable school" as well as the expanded definition of "community," as contained in the revised procedure adequately address the Lutheran Council's previous concerns. The original definition of "community" stated that the community is "the geographical area of the public school district within which the school is located, together with any other public school district from which the school enrolls at least 5 percent of its student body." The expanded definition of community, as defined in the revised procedure, deletes the 5 percent test and replaces it with the words "public school district from which the school enrolls a substantial percentage of its student body." The revised procedure goes on to state that as a guideline for determining what constitutes a "substantial percentage" from one public school district, IRS will consider 20 percent (rather than 5 percent) a substantial percentage of the student body. While the revised procedure still contains a percentage test—which by its nature is somewhat arbitrary—the parameters of that test have been broadened and should serve in the interest of the church-sponsored school.

I briefly want to mention that the Lutheran Council supports the national office appeals process contained in the revised procedure. Such an appeals mechanism will promote uniformity in the interpretation of the procedure.

V. CONCLUSION

On the specific question of comparison between the original IRS Procedure Affecting Private, Tax-Exempt Schools and the revised version which was released on Friday, February 9, the Lutheran Council is generally pleased with the revisions. Much of the presumed burden of guilt placed on the private school as a result of the original procedure has been removed by the revised guidelines.

However, there still exists a broader—a more far-reaching—question which resurfaced with the revenue procedure. A significant public policy change which could have a widespread and an adverse impact on many church-sponsored schools innocent of racial discrimination was being made through a closed, internal procedure. That deeply concerns the church. In publishing the original version of the revenue procedure, which appeared in the Federal Register on August 22, 1978, it was noted by the IRS that the procedure did not meet the Treasury Department's criteria for "significant" regulations. Whether or not departmental standards deem the revenue procedure to be "significant" does not overshadow the overwhelming public outcry by virtually all churches against the proposed revenue procedure. Certainly the religious community's outspoken, concerned, and legitimate response to the revenue procedure indicates the enormous impact which the procedure has on the present and future operations of church-sponsored schools, and the need for a public discussion of the proposed revenue procedure.

We commend this Subcommittee for holding public hearings on the revenue procedure and for recognizing the significance of the issues raised by the IRS guidelines. As I have noted in previous statements presented to both the IRS and the House Ways and Means Subcommittee on Oversight, the Lutheran Council in the USA hopes to continue working closely with the legislative and executive branches of the government on regulatory and legislative policy affecting the church. It is important that open dialogue continues at all levels of government in order to assure that federal policy which has an effect on the church is initiated and implemented in a just, equitable, Constitutional, and democratic fashion. Thank you.

STATEMENT OF NATHAN Z. DERSHOWITZ

In 1971, the Supreme Court affirmed a decision of a federal court in the District of Columbia holding that the deductibility for federal income tax purposes of contributions to, and the exemption from Federal income taxes of the income of any private school under Sections 170 and 501(c)(3) of the Internal Revenue Code would not be permitted if such private school has a racially discriminatory student admissions policy. The District Court decided that the Internal Revenue Code had to be construed in such a way as to deny tax deductions and exemptions to activities that were illegal or contrary to public policy and that there was a significant federal public policy against the practice of racial discrimination by private as well as public schools.

In response to the *Green* decision[1] the Internal Revenue Service in 1971[2] and again in 1975[3] established procedures to assure that private schools eligible for tax exemption maintained racially nondiscriminatory policies.

In 1978, the Service concluded, however, that its procedural requirements were inadequate to insure that tax exempt schools operated on a nondiscriminatory basis and in August 1978 the Service proposed new guidelines for determining whether certain private schools practiced racial discrimination.

Last December, the American Jewish Congress, testifying on its own behalf and on behalf of the American Jewish Committee, the National Jewish Community Relations Advisory Council, the American Association for Jewish Education, the Council of Jewish Federations and the Synagogue Council of America criticized these August 1978 proposals. Although we noted our approval of efforts to eliminate racial discrimination by private schools we pointed out that the proposed new approach filed to recognize the unique and special considerations that affect Jewish religious schools. We argued that the proposed procedure created a presumption that schools formed or expanded during public school desegregation with "insignificant" minority enrollment were guilty of racial discrimination. This presumption, we urged, would improperly sweep within its ambit Jewish religious schools whose policies and practices are wholly nondiscriminatory—the reasons for this are two fold: On the one hand there are few minority students who are Jews and are thus eligible for admission to such schools and on the other the Jewish religious school movement for reasons having nothing to do with racial discrimination enjoyed a growth spurt during the period which, in many areas, coincided with desegregation.

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[1] *Coit* v. *Green*, 404 U.S. 997 (1971) affirming *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1970).

[2] 1971–2 C.B. 238.

[3] 1975–2 C.B. 587.

We urged that the IRS exempt from its procedures "a school that selects students on the basis of membership in a religious denomination if the "denomination or unit is open to all on a racially non-discriminatory basis." We also urged that if the IRS chose to continue to use the presumption based on absence of significant minority enrollment that it calculate what is "significant" in terms of the pool of available applicants from the religious denomination from which the school draws its student body, rather than from the school age population as a whole.

Despite the concern expressed by the American Jewish Congress and other Jewish religious groups over the potentially burdensome effects of the IRS procedures on Jewish religious schools, the IRS on February 9 proposed procedures retaining for the most part the objectionable features of the August version.

The newly proposed procedures continue to employ the presumption that lack of significant minority enrollment is evidence of a racially discriminatory admissions policy. Once this showing is made the school must demonstrate the contrary by specified types of affirmative action. Included in these specified activities are vigorous minority recruitment, employment of minority teachers and minority scholarship programs.

The IRS attempted to meet the concerns of the Jewish community by a provision which states that: "consideration will be given to special circumstances which *limit the school's ability to attract minority students*, such as an emphasis on special programs or special curricula which by their nature are of interest only to identifiable groups which are not composed of a significant number of minority students . . ." (emphasis supplied).

However, although the provision may in practice serve to exclude Jewish religious schools from the application of the procedures the provision does not really meet the full force of the objections voiced by the Jewish community.

It was and is our contention that regardless of whether or not significant numbers of non-Jews are "attracted" to Jewish religious schools, these schools in order fulfill their historic religious and cultural mission as well as their obligation to the community from which they received financial support, are entitled to restrict their enrollment to persons of the Jewish faith either born into the faith or converted by the appropriate procedures. It is our further contention that there is no sufficiently compelling state interest at stake here to require the infringement of the "free exercise" rights of religious Jews to establish and enroll their children in exclusively Jewish schools.

Although the American Jewish Congress and the organizations it represents continue to object to the revised proposed revenue procedures dealing with tax exempt schools we nevertheless believe that it would be unwise for the Senate to adopt either S. 103 or S. 449 at this time.

In the first instance we are hopeful that the Internal Revenue Service after hearing our additional comments submitted on Friday, April 20, 1979, will revise the proposed procedures to accommodate our concerns.

Even if IRS fails to revise the suggested procedures, we believe that the proposed Senate bill are too extreme a response to these procedures. They employ the proverbial elephant gun to attack a gnat.

S. 449 introduced by Senator Hatch amends the Internal Revenue Code to provide that the exemption from taxes or the allowance of a deduction for contributions to non-profit funds or foundations for religious, charitable, scientific, literary or similar purposes shall not be construed as the provision of Federal assistance. Although Senator Hatch's bill does not indicate either in its text or in any accompanying explanatory data to what particular statutory or constitutional enactments the construction it negatives would have applicability, it would appear at least that passage of S. 449 would affect the application of both Title VI and Title IX of the Civil Rights Act of 1964. It can also be assumed that the bill seeks to influence as well the interpretation of the Equal Protection Clause of the U.S. Constitution.

Privately funded non-profit religious or charitable organizations would not be covered by these titles if the sole basis for such application is the fact that the organizations are exempt from federal income tax or contributions to them are deductible for federal income tax purposes. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) provides that "No person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal *financial assistance*" (emphasis supplied).

Similarly, Section 901 of Title IX, 42 U.S.C. 1681, the prohibition on sex discrimination provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal *financial assistance*" (emphasis supplied).

By providing that the exemption from taxation of 501(c)(3) organizations and the allowance of a deduction for contribution to such organizations shall not be construed as Federal assistance, S. 449 would effectively prevent application of the Civil Rights Act of 1964 to these organizations in most instances.

The undersigned organizations believe that the exemptions S. 449 provides are too sweeping and not necessary at this time with respect to racial discrimination.

The important contributions that non-profit religious, charitable and educational institutions make to American society cannot be underestimated. As Judge Henry Friendly of the Court of Appeals of the Second Circuit noted in his distinguished essay "The Dartmouth College Case and The Public-Private Penumbra": "De Tocqueville's rhetorical question "what political power could ever carry on the vast multitude of lesser undertakings that the American citizens perform every day, with the assistance of the principle of association" " is more pertinent today than when it was asked in 1835."

Nevertheless, as significant as is the role played by the charitable non-profit sector in enriching and diversifying American life, we can conceive of no circumstances in which we believe that it would be justified for such non-profit religious, educational or charitable institutions to engage in intentional racial discrimination.

Although we reject the proposed IRS guidelines we do so not because they would interdict intentional racial discrimination by private religious schools but only because they would sweep within their unduly broad reach religious schools which do not engage in intentional racial discrimination but which have a limited number of minority students for reasons having nothing to do with racial discrimination.

We therefore would oppose any bill such as S. 449 which seeks to nullify statutory or constitutional prohibitions against intentional racial discrimination by tax exempt non-profit organizations. There is no question that S. 449, if enacted, could in fact inhibit the application of Title VI of the Civil Rights Act of 1964 to these organizations if the organization's exemption from tax or the allowance of deductibility is the sole basis for the application of the statute to them. On the other hand, we believe, that S. 449 would be legally ineffective in nullifying the application of constitutional prohibitions to this type of organization. Nevertheless, we also oppose S.449's efforts to limit the application of the Equal Protection Clause to tax exempt organizations that engage in racial discrimination. In our view the Supreme Court does and should have the final say as to what type of federal financial assistance so involves the state in the activities of the private institution and so benefits that institution as to constitute the institution an arm of the state and its activities state action for constitutional purposes. For this reason also we oppose passage of S. 449.

With respect to the application of S. 449 to Title IX, we have not studied this question and believe that experience with Title IX is as yet too limited at this time to warrant tinkering with the current legislative scheme. As a general rule, however, we oppose any efforts of which S. 449 seems to be one to weaken government prohibitions against sex discrimination.

Opposition to S. 103

S. 103 provides that the Internal Revenue Service may not implement certain proposed rules relating to the determination of whether to deny tax exemption to private schools which operate on a racially discriminatory basis and it is obligated to promulgate appropriate and workable guidelines. The rulemaking procedure undertaken by the IRS is proper, although the substance of its initial proposal was deficient. Obviously, however, the IRS has paid substantial attention to public comment, and we believe it will do so with respect to the new February 9, 1979 proposed guidelines.

We are therefore persuaded that Congressional action should await final IRS action in this area and should be undertaken only if the IRS fails to properly carry out its obligations and responsibilities. Barring IRS from adopting or implementing any new guidelines in this area, as is proposed by S. 103, we believe is unwise.[4]

Another deficiency of S. 103 is that it will be perceived in minority communities as a signal to private schools that they may continue, and are in fact encouraged, to discriminate without fear of losing their tax exemption. Certainly, Congressional action encouraging this view adopted to overrule past threatened overreaching by IRS would be inappropriate at a time when the IRS is seeking to work out an appropriate balance.

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[4] Our opposition to this bill at this time however, should not be interpreted as total opposition to Congressional legislation on this general subject. Indeed, because of the delicate weighing of various constitutional limitations on government that is necessary in this area, it would be most appropriate for Congress to deal with the general problem. Certainly, Congressional action is more appropriate than action by an administrative agency, whose expertise lies in the collection of taxes and not in the weighing and balancing of conflicting Constitutional rights. We do not believe that we in any way denigrate the Internal Revenue Service when we state that it has no particular expertise in the area of racial discrimination, in freedom of speech or freedom of religion. Reasonable people may disagree about the extent to which one or the other of these interests should give way in favor of others. In a democracy such disputes should be handled by the legislature. However, legislation in the form of a "negative bill" precluding IRS from acting in an area where it is obligated to act is not constructive legislation directed towards dealing with this difficult area.

APPENDIX

Federal Policies and Private Schools

THOMAS VITULLO-MARTIN

Federal aid to private elementary and secondary schools preceded aid to public schools. The first example of direct federal aid to a school appears to have occurred in 1810, when Thomas Jefferson arranged for the Departments of Interior and War to provide the rent for a Catholic schoolhouse in Detroit. For almost two hundred years, the federal government has aided private schools, and, as its role in American political life has grown, the characteristics of the policies that aid private schools have changed. Federal aid policies follow four patterns, loosely related to stages of growth in the importance of federal policies. No sharp divisions in the chronological successions stand out, however, and some first-stage policies can be found in current legislation.

First, the federal government made direct grants or endowment contributions to specific schools, public or private, to obtain their general education services. These grants ensured that schools would be available for children under federal jurisdiction and evidently involved virtually no federal direction of the content of the education. Then, the government began to underwrite or offer other inducements to schools, public or private, that supplied federally desired programs. Next, the federal government expanded this concept to include all programs that schools normally offer—in other words, it proposed a type of general education aid that would include private schools. (Most general aid approaches have been subsequently blocked by the current interpretation of the First Amendment.) Finally, the federal government has turned to a formula whereby it provides services to private school students without providing resources that can be used by the school. It funds public school systems to serve private school students. This awkward arrangement, which substantially affects the relations between public and private schools, was adopted to satisfy constitutional interpretations that require, in effect, that the state and private schools keep their distance from each other.

The discussion of types of aid turns naturally to a discussion of regulation, for as the federal government has gradually become more specific in identifying precisely the kinds of changes it wishes to make in local public and private education, and which groups it targets its aid to reach, aid bills have become increasingly regulative in their effects. Finally, federal policies are emerging with purely regulative effects on private schools—regulations unalloyed with aid. The most recent and significant of these regulations are in the Internal Revenue Code. The introduction of the tax code into a discussion of federal education policies may seem surprising. But no comprehensive review of federal aid to education can be restricted to the programs of the Office of Education (OE).

Federal aid or regulations affecting private schools have been administered by a surprising number of federal departments, including Army, Navy, Defense, Interior, Labor, Housing and Urban Development, Treasury, and Health, Education, and Welfare, and by offices such as the Veterans Administration, Social Security Administration, Bureau of Indian Affairs, Office of Education, and National Institute of Mental Health.

Patterns of Aid

The federal government began aiding schools because it needed education services in areas over which it had primary jurisdiction. At first, its grants and similar aids made little distinction between private and public schools. It purchased services from whatever kind of schools that would provide them.

The first congressional actions aiding private and public education immediately followed the conclusion of the Revolutionary War. The 1783 Treaty of Paris ceded the Northwest Territory to the Congress of the Confederation. Congress took direct responsibility for governing the Northwest Territory. In the Northwest Ordinance of 1787, which set out the procedure for governing the territory and for dividing it into self-governing states, the Congress of the Confederation made clear that its scheme of aid was intended to benefit religious schools: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The territorial legislature was to select the sections of land to be given to the territories for education and the schools it would serve, subject to the approval of Congress. A number of Catholic schools that were open to all students were supported under provisions of the ordinance. With time, the territories became states, and Congress was no longer responsible for the provision of basic elementary and secondary education. But even today Congress has not completely divested itself of responsibility for education in certain specific areas. It has jurisdiction over Indian reservations, where Congress has a treaty obligation to provide education; military bases and reservations, where the established federal practice is to provide for the educational needs of the armed forces and their dependents; and the District of Columbia, the Panama Canal Zone, the Commonwealth of Puerto Rico, the Virgin Islands, Samoa, and the Pacific Trust Territory. In each of these types of jurisdiction, Congress provides funds for the operating subsidies to specific private schools. In several instances, Congress provides direct grants to private schools or provides indirect subsidies, either through grants to local legislatures, which in turn support private schools, or through tuition payments for federally dependent residents enrolled in private schools.

The Morrill Act of 1862 was the first federal program to alter educational policies within the existing states by funding specific and limited types of educational services that in some instances had been provided by the states. Administered by the Department of Agriculture, it set aside public lands within each state for the endowment of agricultural colleges, which could be under private auspices. The program was enlarged, and direct federal appropriations have been provided since the Second Morrill Act was passed in 1890.

In 1917, Congress applied the same broad categorical concept to schools below the college level with the Smith-Hughes Act, administered by the Department of Labor, which gave vocational education grants to the states to train teachers and establish programs. The Smith-Hughes Act required that the program be under public supervision or control, and this clause was generally interpreted to exclude private schools, but the states were given substantial responsibility for administering the act, and some may have included private schools in their programs.

In 1968, the Vocational Education Act, which succeeded the Smith-Hughes Act, was amended to provide vocational education service to private school students, following the child-benefit formula devised for the Elementary and Secondary Education Act of 1965 (ESEA). In 1974 Congress again amended the act. Section 122(a)(7) provides "vocational training through arrangements with private vocational training institutions where such private institutions can make a significant contribution to attaining the objectives of the state plan, and can provide substantially equivalent training at lesser cost, or can provide equipment or services not available in public institutions. . . ." Of all federal laws, this provision of support for private institutions' operating costs related to vocational education comes closest to general education aid to private schools. It is, however, quite clearly directed at a specific education program, though a broad one.

The federal approach to vocational education has also been applied to the education of handicapped persons. Beginning in 1963, the Mental Retardation Facilities Construction Act and the Community Mental Health Centers Act authorized grants by the National Institute of Mental Health of up to 75 percent of total costs for the construction of facilities for training teachers to educate the handicapped and for operating special education programs. Private, nonprofit schools were eligible. Also in 1963, Congress substantially increased the funding of Title V of the Social Security Act, which provides the federal share of operating expenses for these institutions. Substantial portions of the operating costs of the participating private institutions are public funds. The Education for All Handicapped Children Act of 1975 greatly expanded its provisions and made private institutions equally eligible with public ones.

In 1977, the act was amended to incorporate the idea of mainstreaming, that is, placing handicapped students in regular classrooms, and to guarantee "free and public" education to all handicapped children. Through mainstreaming, public school systems will be able to capture the substantially higher amounts of public money available for the education of the handicapped, an incentive for them to pursue the program energetically. Private institutions have greater difficulty mainstreaming because the public funding of students mainstreamed in private schools appears to raise complex legal and constitutional questions. Furthermore, the act's requirement of "free and public" education could mean that public institutions may displace private ones, especially as funding levels increase.

Beginning in 1945, hearings were held on bills to provide across-the-board assistance to the poorer states to raise their per pupil expenditure to a basic minimum. In 1946 a bill reported, but not voted on, by the Senate would have provided a subsidy guaranteeing a per pupil expenditure of $55 in each state. The bill included private school children in those states aiding private schools, but opposition to the measure from groups opposed to aid for religious schools mounted. In 1948, the bill passed the Senate by a vote of 58-22, but was blocked in the House. In 1949, conflict over the religious issue became acute, and both the House and the Senate refused to vote on the bill. Many states at that time provided aid to private schools in one form or another, and the law would have permitted them to continue their local practices. Today fourteen states provide aid to private schools or to their students, including states that pay private school tuition, and thirty-three states offer at least some child-welfare benefits to private school children, such as school transportation.

The attempt to fund private schools through grants to the states, following state laws, would have solved a number of the most difficult political problems surrounding the private aid issue, but it is an idea whose time has passed. Some existing federal grant programs do permit the states to establish their own positions on aiding private schools, such as the program for the handicapped already mentioned, in which state offices of education may or may not contract with private schools to provide handicapped students with education services, but it is not likely to be an important approach in future federal legislation.

Federal aid-to-education programs that include private school students have received the greatest political acceptance when they have been directed at meeting some specific national need. The school lunch program and the school milk program of 1946 and 1954, administered by the Department of Agriculture, subsidized both public and private school students and were not found politically objectionable—despite the heat generated at the time by the issue of general aid to private schools. Both of these programs gave resources and control to private schools and paid them to administer the program. The school lunch and school milk programs originated in the agricultural committees of Congress and were designed to benefit farmers and dairymen. In such cases, proposed legislation to include private schools in aid programs mobilizes interest groups outside education, and the public-private school issue may be swept aside.

In 1958, the National Defense Education Act (NDEA) included special low-interest, long-term loans to private schools for the purchase of science-related equipment. The same legislation provided outright grants to public schools for construction and equipment costs. Initially, NDEA aided private schools more equitably in theory than in practice. By the end of the first three years, 85 percent of the authorized grants for public schools had been allocated to them, but only 8 percent of the loans available to private schools had been committed.

Title VII of NDEA also permitted private schools to receive contracts for education research and demonstration programs that met national defense education objectives. Private schools may apply for education research projects under NDEA and other funding programs, although under current law they would be ineligible to receive funds to carry on any programs they pioneered once the programs are proven effective and ready for diffusion.

NDEA seems to have succeeded in including private schools because its goal was to improve national defense by stimulating the development of science. Thus Congress's purpose overrode the institutional rivalry between public and private schools. The bill's focus on hardware, rather than operating expenses of science education, may also have quieted opposition.

NDEA also directly subsidized the salaries of private school teachers and provided them with a number of indirect subsidies, such as summer training institutes in languages and science. The 1964 amendments extended the cancellation feature of the NDEA Title II loans to private school teachers, who had previously been excluded. Under the current cancellation clause, 10 percent of the principal of an NDEA loan (now called a National Direct Student Loan) is canceled each year for five years if the loan recipient is teaching in certain types of schools. The clause is a valuable salary subsidy, especially to a beginning teacher, since it saves the borrower "after tax" dollars and also delays payback for a five-year, interest-free period. Also, the NDEA amendments of 1964 gave private school teachers attending summer institutes the same stipends paid to public school teachers.

By excluding private schools in the initial legislation, NDEA placed them at a disadvantage in the competition with public schools for teachers. As federal intervention in education increases in magnitude, this problem will become more acute. Some federal programs, either alone or in conjunction with state programs, have subsidized public school budgets specifically to increase the level of teacher expertise to meet particularly difficult educational problems. Since private schools cannot directly receive federal aid for teachers' salaries, although the salaries can themselves be indirectly subsidized, the federal program sets them at a competitive disadvantage. For example, the Bilingual Education Act of 1974 makes grants to public school districts to support bilingual programs, which may include salaries for bilingual education specialists. The program makes it profitable for the public schools to pay a premium for teachers with bilingual skills. Although private school students are to be included in the programs offered by the public schools, this is practically impossible under most program designs, since the bilingual instruction often takes place simultaneously with instruction in reading, mathematics, social studies, and similar subjects. Private schools with bilingual programs generally serve low-income families, have low per pupil revenues, and survive by economizing in a number of ways, including paying teachers low salaries. Their public school competitors in several cities have hired away their bilingual teachers after winning federal grants, forcing some private schools to terminate their programs.

Title I of the Elementary and Secondary Education Act of 1965 (ESEA) introduced a new approach. Previous programs—school lunch and NDEA, for example—benefited private school students by placing resources under the control of the private institutions. By the time ESEA was considered, for all practical purposes the Supreme Court had prevented Congress from continuing that approach in any basic education aid programs. But Congress was unwilling to pass school aid legislation that did not include private school students.

Congress adopted a "child-benefit" approach, establishing broad criteria for identifying children in need of special education services. It provided funds to public school systems for diagnosing the student's learning problems and supplying the needed educational services. The program left local school districts with discretion over the criteria used to identify eligible students, the approach to diagnosing the problems, and the kinds of services, staffing, and evaluation they would provide. A student's enrollment in public or private schools was not to be a factor in his selection for Title I services.

The child-benefit approach received particular support from the heavily Democratic Northeast and Midwest—where private school student populations are large—because legislators realized that the inclusion of private school students would substantially increase the total amount of aid their regions would receive. Aid would be distributed to public schools according to the area's population, not public school enrollment. As a result, the ESEA aid bill has become the principal legislation by which the federal government directly regulates public and private school relationships.

The Emergency School Assistance Program (ESAP) and the Emergency School Aid Act of 1972 (ESAA), which provided funds for programs that would further integration or relieve the problems of segregation, followed the pattern of ESEA. Education services would be provided to private school children by public school employees, as part of the public school program, and the approach has been routinely followed in subsequent legislation. Congress has also funded public schools to attend to the needs of eligible students in private schools in several other social and educational programs. In addition to federal education programs, funds from other programs have been applied to the needs of private school students in some communities. The Community Development (CD) Block Grant program, for example, funds scholarships to private schools for residents of CD target areas in some communities. CD funds have gone directly to private schools to provide residents of target areas with remedial services and to rehabilitate school buildings. Funds from the Comprehensive Employment and Training Act (CETA) program have also been granted to some private schools sponsoring CETA job-training programs. These activities continue a long tradition of involving private schools in federal economic development programs.

Patterns of Regulation

Almost all federal aid programs regulate their recipients, but the degree of regulation varies greatly. All education aid programs entail a kind of contract between the federal government and the state, the local school district, or the private school. The recipient, in turn, is to spend that money for some specified service the federal government wishes to support. If the service is not provided in the specified manner, the aid ceases.

The degree of regulation depends on the degree of specificity about the recipient's duties and the extent of enforcement in the contract or grant. Some contracts do not go into detail. General school aid bills discussed in the 1940s through the early 1960s, for example, would have required little from the states in order for them to comply with the contract terms; they would simply have had to spend the money on education. Under the child-benefit approach, Congress turned to categorical aid programs, specifying who would be served, what kinds of services or materials would be provided, and under what conditions. Thus, although categorical grants were voluntary school aid programs—which states, local districts, and private schools had to apply for if they wished to receive grants—these categorical programs nevertheless often became highly regulated ones.

The federal government has regulated private education since the early nineteenth century. Through the Supreme Court's power of constitutional review of state legislation, it began by regulating the conduct of the states toward private schools. Later the federal government began direct regulation of private schools through a number of federal regulatory agencies. More recently, it has been indirectly regulating private schools through categorical aid programs.

The Supreme Court has generally restricted the state's regulation of private education and limited public aid to private schools. But the early cases involving federal aid supported such aid. The Court upheld the commissioner of Indian affairs in providing funds to the Bureau of Catholic Indian Missions in *Quick Bear* v. *Leupp* (1908), and it upheld the provision of textbooks to private school pupils through state funds in *Cochran* v. *Louisiana* (1930). In *Everson* v. *Board of Education of Ewing Township* (1947), the Court held it constitutional to reimburse parents of religious school pupils for busing their children to school and to establish rules for the busing.

In the 1960s and 1970s, the Court considered a number of state laws that sought to subsidize private schools directly, fund programs with specific educational objectives, subsidize tuition payments to private schools, and alter the taxation policies affecting tuition payments. It has not established a principle by which one could predict the judicial outcome of a challenge to state aid laws. The most recent cases appear to have been decided by a bargaining process among the justices. States can pay for school bus transportation to and from private schools but not for field trips in the same buses. States can provide textbooks but not maps and workbooks, and also diagnostic but not remedial services. In considering state aid to private schools, the Court has created a dual system in which aid to private higher education is treated much less restrictively than aid to elementary and secondary schools. In recent years the Court has tended to treat private elementary and secondary schools as similar to public schools insofar as they are properly subject to the powers of state and federal regulative agencies but to emphasize their separation when considering policies of direct or indirect general or categorical aid.

The U. S. Office of Education (OE) is the most active agency regulating private schools. Its role as regulator has increased in recent years, and it is felt more by some types of private schools than others. Initially, OE regulated only the activities of the recipients that were related to their use of the funds. Thus, in ESEA Title I, at first only the Title I portion of the public school budgets was examined. As the categorical programs have matured the inadequacy of the early federal approach became apparent, and regulations and monitoring were extended to cover many of the nonfederally funded activities. OE, in particular, enlarged regulations designed to ensure that federal programs would not have the effect of segregating pupils and that the districts would not bypass the intent of categorical federal aid by using federal funds to replace local funds.

Only a few private schools are directly affected by federal enforcement of regulations attached to categorical programs, because only a few directly receive funds from federal sources. There are direct federal subsidies to private schools for the handicapped, to certain other private schools at the elementary and secondary level, and to almost all private colleges. These schools are subject to much greater federal regulation than private schools that do not receive federal funds.

Nevertheless, the private elementary and secondary schools whose students receive Title I services provided by public schools do not totally escape the effects of regulation. In order for their children to receive services from the public system, the private schools must submit to the regulations of the public system providing the services. For example, the public school system may require the private school to follow specified program planning procedures in commenting on a Title I proposal. It may require a private school staff to meet state certification requirements in bilingual education before including the private school students in a bilingual program.

Private schools are subject to the direct regulations of a number of other federal agencies, including the National Labor Relations Board, the Environmental Protection Agency, the Occupational Health and Safety Agency, the Equal Employment Opportunity Commission, the Office of Civil Rights, and the Internal Revenue Service (IRS). The IRS is a particularly effective regulator, restricting such activities as political lobbying by private schools or their use of segregationist admissions policies. Violators lose their tax-exempt status. In 1978 the IRS proposed new rules to compel private schools to take positive steps toward integration, such as offering scholarships to minority students, if the schools are not integrated in proportion to the number of minority students in their community. Schools that do not comply will lose their tax-exempt status. The new IRS rules may be amended before final implementation, but they indicate that IRS may assume a much more aggressive regulative posture toward private schools in the future.

The proposed IRS regulations are particularly significant for three reasons. First, they will affect only private schools. Second, the sanctions attached to the regulations—loss of tax-exempt status—would affect the schools' incomes to a greater degree than most court fines, since they would significantly reduce contributions that sustain the schools and may decrease the proceeds from school-operated businesses. Finally, the process by which IRS makes new administrative rules is unfamiliar to most education interest groups, and the legal safeguards that apply in IRS administrative enforcement hearings are more limited than those that apply to most other administrative, civil, and criminal hearings.

Both ESEA and the Internal Revenue Code are examples of the types of laws with important indirect regulative effects on private schools. These laws regulate the behavior of private schools through the rules they establish for third parties, such as public school systems providing federally sponsored education services that include private school students in their programs or families choosing to enroll their children in private schools. For example, federal regulations, at least as interpreted in New York City, prevent public school systems from providing bilingual education services funded under Title VII of ESEA to private school students, unless the private schools provide a state-certified bilingual teacher as the regular classroom teacher. Hence, the law in effect requires the private school to follow the federal regulations or exclude its students from the federal program implemented by the public school system. Strictly considered, however, the law regulates only the public school behavior, preventing it from serving private school students in certain circumstances. Most legislation following the child-benefit approach indirectly regulates private schools, but federal laws outside the education area also have this effect.

Prior to ESEA, public school districts typically gave the politically strongest neighborhoods within their jurisdiction the best school services. In wealthy neighborhoods, one could expect to find the most experienced teachers with the most advanced degrees and the best equipped playground, library, music room, and the like. In the poorest neighborhoods, teachers were inexperienced, classrooms were overcrowded, facilities were minimal, and everything was in need of repair. Per pupil expenditures often varied widely within the same school system. ESEA forced systems to equalize their expenditures among schools, before it would permit the distribution of federal funds.

Title I funds cannot subsidize the regular school program. Title I children must receive special services, over and above those they would ordinarily receive from their school. OE found this aspect of Title I difficult to enforce, for it discovered that many school districts withdrew their own funds and staff from Title I public schools and put them into schools not entitled to receive them. In other words, the districts used the funds as general aid, and Title I provided nothing extra for the eligible students. In the language of Title I, the school districts had "supplanted" local funds with federal funds. The regulation issued to control supplanting simply stated that public school districts had to equalize their per pupil expenditures throughout the schools in a district, at least to the extent that no Title I school received less in local and state funds than ineligible schools on a per pupil basis. Only then could Title I funds be distributed.

ESEA has changed public and private school relationships. Under this legislation, public school districts receive funds in accordance with a formula based only on population and income. The schools then identify eligible students and provide them with services, whether they are in private or public schools. This created problems. Later amendments to ESEA attempted to correct the difficulties by requiring both the formation of parent advisory committees to oversee ESEA programs and by requiring representatives of nonpublic school parents on these committees. They also required that the public system involve private schools early enough in the planning of the ESEA program to ensure that the final proposal reflected the needs of private as well as public school students. Thus the law created a mechanism by which private school representatives—often parents of private school children but also some administrators—could influence public school policy.

The amendments also established a bypass procedure to include private school students in ESEA programs in states whose laws prohibited the state from serving nonpublic school students. Upon an opinion from the state that its constitution or laws prohibit the inclusion of such students in the program, or upon a finding by the commissioner of education that the state or school district does not include these students equitably, the commissioner may remove a proportionate amount of Title I funds from the state's allocation and contract with a private, nonprofit institution to provide them with services. Although the measure is not punitive, it does deprive the public systems of a portion of their staffs and is quite painful to systems using the funds provided by the federal government for private school students to increase the services to public school students. The change forces a cutback in the public school program.

In order for private school students to participate in federally funded programs, the public schools must draft proposals that include them. The quality and suitability of the services the private school students receive depend on the degree to which the private schools have been involved in planning and coordinating programs designed to meet the students' educational needs. In the early years of ESEA and other programs, public schools frequently took no steps to include private school students in their proposals. Often, they failed to consult with the private school administrators to develop the most effective programs for the private school students. The 1974 Education Amendments altered Title VII of ESEA and ESAA by requiring public school systems to provide for the needs of private school students in all grant proposals. The amendments also tightened the requirements that public systems include private schools in the early needs assessment and planning stages that a district applying for Title I funds must complete.

Investigations in 1976 found that state offices of education, which are funded by Congress to administer Title I and other federal education aid programs within their borders, were not monitoring the compliance of local districts required to serve private school children without discrimination. Problems with the amount and quality of the services have persisted, and the 1978 Education Amendments further tightened the regulations. For the first time Congress required equal expenditures, consistent with disability, on students in private and public schools. Congress increased the power of private school representatives to block ESEA grants to districts that do not adequately include private school students and required states to monitor and report on public school systems' compliance with the federal requirement that they include private school students equitably.

The most important federal measures affecting private schools, however, are not education laws but provisions of the Internal Revenue Codes, which restrict the education choices open to parents. In education, they form "an ecology of perverse incentives," in Norton Long's phrase. Three aspects of the tax system affect private education. First, state and local taxes that fund public education expenditures represent deductions from personal and corporate tax liabilities. The deductions disproportionately benefit the wealthy because their tax rates are higher and therefore their dollar tax savings are much greater on the same level of expenditure.

Second, private school tuition expenditures are not tax deductible. Individual private school costs are subject to tax, but public school costs are not. The federal government taxes 10 to 14 percent of the cost of private school tuition through the federal income tax. For families in the highest federal income tax brackets, a before-tax dollar is worth four times an after-tax dollar.

This effect has been aggravated in recent years by the failure of the government to index the tax system, so that the tax rate applying to families paying tuition to private schools has increased without any corresponding improvement in their real ability to pay. Their income and expenses have risen with inflation, and the tax system has increased its rate of taxation. The percentage of income devoted to private education expenses that accrues to the government through the tax system increases each year. The impact of this provision of the tax code has only recently become severe, because only in the 1960s did private religious schools begin, in large numbers, to be financed principally by tuition income. In earlier decades during the period of income taxation, private religious schools were funded principally through tax-deductible contributions to parish churches. The federal income tax revenues from income spent on private education have increased by several hundred percent in the past fifteen years.

Third, the Internal Revenue Codes exempt only certain nonprofit institutions from taxation. These institutions must either meet specific federal regulations or pay taxes. Hence, the penalties for noncompliance are substantial. The federal government has no comparable force to wield over public schools.

Conclusion

A review of federal aid to private schools indicates that Congress has directly aided them in areas that are its direct responsibility. The Supreme Court's ruling of a constitutional limitation on public aid to private education, a recent interpretation, has unreasonably distinguished between elementary and secondary education on the one hand and higher education on the other, and has changed frequently in a contradictory fashion over the past twenty years.

The federal government has aided private (and public) education through a large number of programs housed outside not only the Office of Education but also outside the Department of Health, Education, and Welfare. The child-benefit approach—by which Congress funds public school districts to serve all eligible children, in private as well as in public schools—has been adopted only in HEW programs. Programs outside HEW normally give resources directly to private institutions. Within HEW, OE programs are more stringent in excluding private schools from the control of resources than those in other divisions, such as those operated by the National Institute of Mental Health. The pattern suggests that a traditional interest group politics best explains the development of the federal policies that define private school involvement in federal programs.

Finally, the indirect effects of federal education and taxation policy are responsible for important changes in private education. The child-benefit approach, conceived in part to isolate private schools from federal regulation, has produced greater changes in the organization and behavior of private education, and in the relations of private to public schools, than have all previous federal direct-aid programs combined. Taxation policy, by forcing wealthier parents into suburban public schools at the expense of urban private schools, has substantially increased the degree of segregation experienced by the children of the wealthy, the segregation of residential areas in cities, and the extent of federally subsidized education for the wealthy. Whatever the effects of existing taxation policies, taxation itself is a policy with increasingly regulative effects for private education.

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Conventional wisdom suggests that private schools are elitist and do not do not benefit the community as a whole—not to mention its public schools. Indeed, as recently evidenced, when a public official supports private schools, even to the extent of proposing tax credits for tuitions paid by parents, he incurs the wrath of "liberals."

Marshaling evidence from around the country as well as from New York City, Dr. Thomas Vitullo-Martin sharply questions this traditional view. Further, he suggests that its private schools may be one of the city's most potent weapons in stemming the flight of the middle class to the suburbs and the continued erosion of the city's economic base.

Many families, dissatisfied with the city's public schools, may be well off enough to buy a suburban home in order to send their children to a public school there. But they may not be able to afford the taxable dollars required to remain in the city and send their children to comparable private schools. In this regard, Dr. Vitullo-Martin probes fresh ground by unraveling the way the federal income tax codes, in effect, subsidize suburban public education without giving an equitable benefit to parents who opt to stay in the city and use private schools.

The author's argument merits the attention of those who are concerned with and responsible for the city's socioeconomic well-being.

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New York City's Interest in Reform of Tax Treatment of School Expenses

Retaining the Middle Class in the City

Thomas Vitullo-Martin

It's not news that New York City is losing its white middle class. What is surprising is how the loss is tied so tightly to school-age children. Between 1970 and 1975, New York City lost 15.3% of its total of intact white families with children under 18, a loss of more than 15,000 families per year, according to the Foundation for Child Development (FCD).[1]

Some of this change is the result of forces beyond the city's control—reduced rate of family formation and reduced birth rate among whites and an increase in the number of single-parent families. But roughly 60% of this loss, 9,000 families per year, comes from white families moving out of the city.[2] More families flee to the suburbs when their children are five to fourteen years old, says a study for the Council of Great City Schools. These moves hurt the city. "The decision about where to live by parents in their late twenties and early thirties will . . . continue to be a prime determinant of the racial and socioeconomic composition of the central cities and suburbs."[3] In New York City, while children form a larger portion of all under-six-year-olds than they do of any other age group because as many white children reach school age their families leave the city.[4]

The FCD data show an astonishing difference in median income between New York City families with children and those without. Those with children had a median income of $11,912 in 1975; childless families had a median income of $15,453. New Yorkers with children had a lower income than their national counterparts; those without children, a higher income.[5] The implications of the data seem pretty clear: More affluent New Yorkers with children leave the city when their children reach school age.

The exodus to the suburbs is skewing the city's racial makeup and weakening its tax base. Today, 89% of all minorities living in the New York City metropolitan area live in the city itself.[6] The flight of the wealthier white families has left the city with a school-age population in which one of every four children comes from a family with an income below the poverty level.

New York City was not alone in losing white families. Between 1960 and 1970, central cities in the Northeast lost 16.2% of their white families to the suburbs, almost twice the national rate. University of Wisconsin sociologist William Frey argues that "the most damaging aspect of this flight, from the perspective of a city's economic viability, is not the out-movement of whites per se, but the loss of the city's upper-status, high-income population—a subgroup which tends to be overwhelmingly white."[7] In the older Northeast cities Frey studied, between

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Summary

New York City has a strong interest in reform of the way federal income tax codes treat education expenses. For years, city officials have known that the middle-class exodus weakening the city's tax base is, to a great extent, attributable to the high quality of suburban public schools.

The city's answer has been to try to improve its own public schools, but massive reform is always slow, too slow to effect current outmigration. This solution also ignores an important aspect of the middle class's flight to the suburbs: tax advantages. In the wealthier suburbs, middle- and upper-income families not only get higher quality education for their children, they pay less for it.

The federal tax codes allow individuals to deduct from their taxable income local taxes that support public education—but not tuition to public or private schools. State and local income tax laws generally follow federal rules. The deduction of a local tax from federally taxable income is, in effect, a federal subsidy of the local tax.

If a family is in the 50% federal tax bracket, the net increase in its total tax obligation of a $3,000 rise in property taxes is only $1,500—only $1,240 if we take into account the effects of state and city income taxes. The local government raises its revenue by $3,000, but the federal government simultaneously decreases its revenue by $1,175. Any tax deduction is, of course, worth more to a high-income family than to one with a low income. The aggregate effect of the tax deduction system on a high-income community is that the federal and state governments pay a higher percentage of the community's tax obligation—up to 70% of local taxes in some New York suburbs compared with less than 15% of city taxes.

One social effect of this regressive tax provision is to drive high-bracket taxpayers from the city. These citizens need little in the way of public services; they provide most of their own needs from their own resources. One thing they do need, however, and something they find in the suburbs, is quality education. Local suburban districts commonly concentrate as much as 80% of their tax revenues on support of their schools. Local taxes, in effect, are little more than tuition to these exclusive public schools. And this "tuition" is made much less costly to the families in the district because they can deduct it from their taxable income.

In contrast, New York City, which must handle massive and more diverse social problems than the suburban governments, can spend less of its tax revenues on public schools—about 20% of its income from local taxes. And city schools must address a much broader range of more difficult education problems than the suburban schools. The tax system exacerbates the situation because the aggregate value of the federal subsidy of New York City schools through the tax deduction is much lower. In essence, suburban public schools can concentrate more on the needs of upper-income families, and the federal and state tax systems make it easier for the suburbs to pay for these schools.

New York City does have schools that compete with high-quality suburban schools in attracting middle and upper-income families: private schools. But because the tax system does not permit families to deduct tuition payments, private schools are farther out of reach for city families than the schools' tuitions would suggest.

A New York City family with $45,000 taxable income and two children in independent private schools (an average $8,000 per year expense) must allocate about $24,000 of gross taxable income to meet those education expenses. The 14 years of nursery, elementary, and secondary schools will cost the family more than $336,000 of its earnings. The family's alternative would be to move to a suburb with public schools of comparable quality and put that $336,000 into a house or other capital investment. The combination of disproportionate tax benefits for the public education expenses of wealthy suburbs and the substantial tax disadvantages of using private schools in the city drives out middle- and upper-income families.

The elimination of the tax deductability of local taxes is not a popular proposal and would be difficult for the city to promote at the federal level. In addition, the change would create some problems for the city. Federal coffers would take in a lot more money, but the city wouldn't necessarily *get* more of it. Eliminating the deductability of local taxes is politically risky and probably out of reach. But providing for the deduction of school tuitions would benefit the city—and that measure is *within* reach.

The major objections to such a change in the tax laws have centered on the presumed elitist, segregationist appeal of private schools. Enrollment data, however, show private school students to be quite similar socioeconomically to those in the public schools. In some sections of the country private schools enroll even higher percentages of minorities than public schools. And private schools serving the highest-income clients enroll higher percentages of minority and low- and moderate-income students than public schools with similar clients—principally because they offer scholarship aid, which public schools do not.

Objections also center on the economic and political impact of private school enrollments on public schools. A careful review shows that the central city public schools will have more resources for fewer students as a result of increased private school enrollment. The city's private schools are valuable social and economic resources, and have the reputation of delivering the highest quality education to inner-city students in particular. Present tax laws damage them and the city.

1965 and 1970, 30%-40% of high-status whites had moved to the suburbs.

Frey's analysis of the causes of their flight showed that the highest-status, highest-income families were motivated particularly by relatively higher levels of per pupil expenditures in suburban school districts. Either these families put more emphasis on education than lower-status, lower-income families, or their high income gave them the means to move in the pursuit of better quality education for their children.

In a similar study, Janet Pack uncovered an additional factor motivating high-status families to relocate. Along with education, Pack found tax considerations of particular importance in the family's decision to leave the central city.[8] Pack's research concerned property taxes, which are much less important to most families than state and federal income taxes. We shall explore how these taxes affect the decisions of higher-income families to remain in or leave the city.

White Flight and Income Taxes

Most commentators on white middle-class migration from city to suburb have ignored the Internal Revenue Codes as a factor. They have preferred to blame the exodus on the generally poor quality of city public schools. There is reason to believe that even if these schools offered an education equivalent to that in the most exclusive suburban public schools, migration from the city would still be similar to what we see today simply because the migration pattern is so heavily reinforced by the federal tax codes.

The tax codes influence family relocation decisions. The average American family relocates every five years. The quality of local schools, housing amenities, relative costs of the new house, other community services and amenities, and the tax effects of the relocation all play a role in the family's choice of a new residential location. It is consistent with Frey's data (although he himself does not argue the point) that the higher the family income, the more significant are tax considerations in the choice of a new location.

When commentators hold city schools responsible for the large-scale exodus of white, middle-class families, they assume that these families cannot find city schools equivalent to those in the suburbs. But this is simply not true. Parents seeking quality education for their children can find it in the city's private schools, whose quality is at least the equivalent of that in suburban public schools. The existence of quality private schools thus should encourage wealthier families to remain in the city. But because the tax system massively penalizes upper- and middle-class families using these schools, it limits private schools' ability to hold these families in the city.

According to the U.S. Department of Labor, a family of four at the "higher level" standard of living in the New York City area required an income of $34,252 in 1978. The amount would be higher in the city proper, putting the city family in the 50% federal tax bracket. To give their children an education equivalent to that of the best suburban public schools, these families would have to use private schools in the city. But private school tuition and related expenses are not tax deductible. In the 50% bracket, a family must earn two dollars to pay for every dollar it spends to send its children to a private school.

The family's alternative is a "free" public school education in the suburbs. It does pay something extra for quality suburban public schools in the higher price tag and property taxes on a home in a desirable school district. Both these costs are moderated, however, by associated federal income tax deductions.

By far the most important factor that virtually forces middle- and upper-income families to leave the city is the combination of the substantial tax benefits given those who use the free suburban public schools and the huge tax disincentives attached to using urban private schools.

The issue here is not equity. No one could seriously argue that it is unfair for affluent families to pay more than poor families to obtain a good education for their children. Rather, the concerns are what family choices do the tax and education systems encourage, and what are the social effects of those choices? The tax system encourages upper-income and middle-income families to leave the city for the suburbs, where their children can attend free public schools that are the academic equivalents of urban private schools; the system thereby encourages these families to take a substantial public subsidy for their education expenses. In the end, we will see there is a serious question of equity in this issue. By way of the tax system alone, the federal government gives many times more aid to wealthy suburban families than it gives poorer urban families through all federal education programs *and* the tax system.

This essay attempts to clarify New York City's interest in tax reforms that would remove some of the incentives for upper- and middle-income white families to leave the city. The argument is complicated, first, because it centers on the incentive- and disincentive effects of deductions from taxable personal income. (Trying to understand how tax deductions affect social behavior is a little like trying to see the photographic print in the negative.) Second, tax reforms discussed here would alter the calculations parents make in choosing private or public schools. Therefore, a discussion of these tax reforms necessarily involves consideration of the city's private schools, especially their racial and economic composition, and of the social policies advanced or retarded by encouraging upper-, middle-, or lower-income families to use the private schools.

The tax system's present treatment of education expenses puts the city at a dis-

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advantage. Private schools in the city ameliorate the disadvantage, and tax reforms would further reduce—if not eliminate—it. Ultimately, the argument rests on the conviction that increasing the resources committed to education within New York City and retaining for the city more of the resources its citizens spend on schools—instead of allowing them to be frittered off to Washington—greatly benefits the city, its economy, its public schools, and all its residents whatever their income.

How Taxes Influence Behavior

From its original use as a simple revenue-raising device, the federal income tax system has become a means of changing behavior. Initially, the system was directed at altering purely economic decisions. It gave incentives to families financing their own homes, to wealthy individuals investing in municipal bonds, to businesses making capital investments in new equipment, and so on. Current tax laws also give incentives to businesses to educate their employees. Businesses can deduct expenses for the education of their employees if the education is related to the improvement of the employees' job skills. Nonbusiness-related education expenses, however, are not deductible.

In drawing up these tax rules, Congress appears to have focused only on economic considerations. But tax rules have social as well as economic effects. The tax treatment of education expenses has social impacts that have been ignored—to New York City's detriment—and should be examined.

Although families do not choose schools in the strict, economically rational fashion that investors choose bonds, a change in tax policy will still normally affect a family's education decisions. The higher the family's income, the higher its tax bracket, the more valuable the tax deductions, and the more likely the family will be influenced by tax policy. Suburbs offer several tax-related attractions to the higher-income family, all of which are enhanced by current federal tax codes.

In contrast to New York City, the typical affluent suburb has a wealthier tax base, fewer children per household, and, therefore, lower education expenses per household. The suburb can spend substantially more per pupil and still keep taxes relatively low because upper-income families seek few other public services. These families are able to provide more of what they need themselves; they live in low-density areas that require low capital investment and lower public service expenses. Local suburban governments principally provide the public services that wealthy families need and avoid the expense of those services used predominantly by lower-income families, such as welfare, parks, public transportation, and the like.

Central cities provide all these services and more. Wealthy families in the city must pay for such services even though they may make only minimal use of them. For upper-income families, then, suburbs are more efficient: They charge taxes for and deliver only those services needed by their wealthy residents. In the suburbs, affluent families bear little of the burden of caring for the poor, which they would have to do if they lived in the city.

The federal tax codes enhance this natural advantage of the suburbs, by permitting wealthy families to deduct local taxes from their federally taxable income. This deduction is, in effect, a subsidy to the affluent suburb by the federal government because the federal government forgoes a part of the taxpayer's normal tax obligation whenever the local government raises taxes. The significance of the deduction of local taxes is much greater in the affluent suburb, where most families are in high tax brackets, than it is in the central city, where most are in relatively low tax brackets. The proportion of the local budget refunded by the federal government through tax deductions of local taxes is therefore greater in affluent jurisdictions than in low-income suburbs or the central city.

Thus, it is doubly easy for the affluent suburb to raise its taxes and increase local revenues because (1) any given amount of tax revenue represents a smaller proportion of average family income in the affluent suburb than it does in the poorer central city ($2,500 property tax is a greater proportion of a city family's $15,000 annual income than of a suburbanite's $50,000 income); and (2) the federal government refunds a greater proportion of local taxes to the wealthy than to the poor.

A local government's increase of property taxes by $5,000 per year changes the tax liability of a family in the 50% bracket by only $2,500. It changes the tax liability of a family in the 15% bracket by $4,250. If a school district's taxpayers are all in high tax brackets, we can expect to find as much as 50% of local public expenses subsidized by the federal government through the tax system. And state and local income tax systems increase this amount of governmental subsidy. In New York City and any areas with more mixed populations, the federal government provides a subsidy through deductions on personal income of only about 15%.

The city's situation is even worse than it seems. The federal government provides a 15% subsidy of city taxes only *in theory*. Families at New York's median family income level normally use the federal standard deduction and do not itemize expenses. Thus, if the city raises its taxes $1,000 per family in order to improve the public schools, most families would have to pay $1,000 out of pocket—because they do not itemize. In wealthy suburbs, in contrast, the average family would be out of pocket only $250 to $500. The federal tax codes reduce the tax increase to high-income families in the wealthy suburbs by 50% or more but do not reduce the cost to lower-income families at all. (The state and city income tax codes follow suit and increase the advantage of the wealthy family.) It is, therefore, much more difficult for central cities than for wealthy suburbs to raise taxes *because of the federal tax provisions.*[9]

Tax Deductions as a Form of Public School Aid

Let us examine this reasoning in greater detail: (1) the entire operating expense of local government—including local schools—is raised by state and local taxes and is deductible from personal income subject to federal taxation; (2) this deduction is, in effect, a federal subsidy of local expenditures; (3) in places where the average family income is relatively high, the average tax bracket is higher, and consequently, the value of the average deduction is greater; (4) as a result, affluent suburbs receive a far greater per capita subsidy from the federal government than do central cities, and this federal aid covers a far greater proportion of all local expenditures in these wealthy areas; (5) public school aid through the tax system far exceeds direct programmatic aid the federal government gives to support education.

In 1978, state and local governments raised about $90 billion to support the operations of their public schools. The federal government refunded, through tax deductions, $20 billion or more of this cost—almost three times the direct federal education budget of about $7 billion for all programs. Although the direct programmatic budget is modestly skewed to aid lower-income areas, the refund program is much more heavily skewed in the opposite direction. The net effect of federal intervention in education is to subsidize the wealthiest families in the wealthiest districts far more than the central cities and their residents.

For example, Pocantico Hills, N.Y., which operates only elementary schools, spent $9,080 per pupil in 1977-78, compared with New York City's approximately $2,700 per pupil. The median income in Pocantico Hills was twice that of New York City in 1970, and the difference has probably increased since then. The federal government gives Pocantico Hills almost seven times as much aid per pupil as it gives New York City (see box, "Pocantico Hills and New York City: How Federal Education Aid Works"). So Pocantico Hills is quite attractive to anyone who can afford to move into the district, and it will attract the wealthiest families from the city.

Tax Disincentives for Using Private Schools

The tax system, with all its consequent disadvantages for central cities, drives wealthier families from the city

New York City and Pocantico Hills: How Federal Education Aid Works

Substantial federal aid comes to local schools districts through the income tax system, but some districts benefit more than others from this form of federal support. Income tax data are not reported for communities, so we are forced to make some assumptions about the tax brackets of the average taxpayers in New York City and Pocantico Hills in order to estimate the comparative value of federal aid to these cities through deductions of local taxes that support their schools.

To determine the effect of federal tax aid on the public schools, we must first determine the portion of per pupil expenditure in the school system raised through taxes at the local and state levels because only this portion of the school bill becomes a deduction from the income tax obligations of the school district's residents. Federal aid to the district is not paid for out of local taxes and, therefore, is not a deduction from federal tax obligation. To calculate the actual federal tax aid to a district, we must subtract the value of federal education aid to the district from its per pupil expenditure.

We must next determine the average tax bracket of the school district's residents, since the value of the deduction of local school taxes is equal to the taxpayer's tax bracket. For example, if a taxpayer is in the 25% bracket, an increase in local school taxes of $1,000 means a reduction of federal taxes by a little more than $250. The taxpayer has to come up with 75% of the new taxes because the federal government, in effect, shares the cost of the taxation by lowering its own tax bill. If the taxpayer falls into the 50% bracket, his or her federal taxes are reduced by a little more than $500.

State and local income taxes follow the federal regulations on these deductions, so the amount of local school taxes paid for through tax deductions is correspondingly greater. For those in the 50% tax bracket who live in New York State and work in New York City, the deduction is worth almost 70% of the local tax obligation. In other words, when a local government increases taxes by $1,000, these high-bracket taxpayers pay only $300 in additional taxes. The other $700 that comes to the local system is, in effect, a transfer payment from local, state, and federal governments to the taxpayer's school system.

Let us look at the effects of the deduction system on two districts—New York City, whose population is at about the national average tax bracket, and Pocantico Hills, a high-income, high-spending school district in Westchester County. We can calculate the average tax bracket of a resident of the two districts by relating it to median family income as determined by census bureau surveys. If we multiply the median tax bracket by each community's per pupil expenditure, less federal programmatic aid, we have a reasonable estimate of the per pupil federal aid to each district through the operation of the tax system.

- **New York City**. Median family income in 1975 was $13,459. The corresponding combined federal, state, and local tax bracket, after the standard deduction, is 16%.

Per pupil expenditure less federal programmatic aid equals:

($2.9 billion - $0.3 billion) ÷ 1,033,813 students = $2,500.

Federal, state, and local tax aid to the school system equals:

$2,500 x 16% = $400 per pupil.

However, those taking a standard deduction do not itemize local taxes; thus, the city does not get any additional tax benefit when it increases taxes to support the school system.

- **Pocantico Hills**. Median family income is estimated, on the basis of the 1970 census, to be $40,000. The combined federal, state, and local income tax bracket would be approximately 64%.

Per pupil expenditure less federal programmatic aid equals:

($3,449,699 - $788) ÷ 380 students = $9,076.

Federal, state, and local tax aid to the school system equals:

$9,076 x 64% = $5,809.

Through the tax system, Pocantico Hills receives *15 times* more aid per pupil than New York City.

to suburbs where residents have high median incomes. One cure for the problem would be, as President Carter suggested in his first tax reform message, to eliminate the deduction for local property taxes from federal tax returns, thus reducing the tax advantage of the suburbs. Such a reform would make support of suburban schools much more difficult and would encourage families to remain in or move back to the central city. But the move would also be likely to have the net effect of reducing local investment in education, and it would force greater reliance on federal and state governments to finance schools, which is not necessarily a desirable change or one likely to benefit cities.

What is the solution for the cities? Some suggest that sufficient money put into New York City's public schools could make them more attractive than suburban schools. That solution does not appear practical principally because (1) the change would take too long to have the desired effect; (2) no one knows how much more money would be necessary (the system's budget has more than doubled since 1970, while its student population has declined by about 14%, with no noticeable improvement in the system's reputation for quality); and (3) the city would not be able to increase education spending without increasing spending for other city services during the fiscal crisis. Certainly the improvement of the city's public schools—especially to regain their reputation as superior to the best private schools—should be pursued. But right now private schools attract and retain middle- and upper-income families in the city. Their continued presence in New York will determine the future racial and economic makeup of its population. The city can take steps to enhance the effectiveness of these schools, by working for changes in the federal tax system—changes that could actually increase the city's revenues.

Upper-income New Yorkers are most likely to enroll their children in religiously affiliated or independent private schools, schools that charge high tuitions because they are not supported by a church, foundation, or other outside source. Tuitions range from $2,000 per year to $6,000, with an average charge of about $3,000. In addition, parents must bear the cost of school bus transportation and other fees and services normally borne by suburban governments or public school systems. The present tax system effectively doubles and triples these costs.

The amount of the penalty the tax system imposes is a function of the federal, state, and local income tax brackets into which the family's income falls. These, of course, vary with income. Current representative federal tax brackets for a married couple filing jointly are as follows:

Taxable Income (in thousands)	**Tax Bracket**
8-12	22%
16-20	28
24-28	36
32-36	42
40-44	48
52-64	53
76-88	58
100-120	62
140-160	66
180-200	69

As a rule, state and city taxes average one-third of federal taxes. For the sake of clarity, let us take an extreme example, that of a family with a very high income. The line of argument, however, applies to all tax levels.

A New York City family with a taxable income of $45,000 is in the 50% federal tax bracket. In addition, it is at approximately the 17% state and local bracket. After paying taxes ($14,700 federal and $5,500 state and local) the family has $24,800 remaining to pay nondeductible living expenses, such as food, clothing, rent, and tuition to private schools. Tuition and related education expenses for two children in private schools in the city would average about $8,000 per year, approximately one-third the family's after-tax income, leaving it with $16,800 for other expenses. Clearly, using private schools requires a deep commitment to living in the city, since the public schools in the suburbs, as an alternative, often have a reputation for comparable quality.

If education expenses were deductible, as they would be if they were simply business expenses or religious contributions, the impact on the family would be quite different. An $8,000 deduction from a taxable income of $45,000 would bring the family down two tax brackets. It would pay $10,800 federal and $4,200 state and local taxes on its $37,000 taxable income. After all taxes and education expenses were paid, the family would be left with $22,000, or $5,200 more than it has today, without the tax deduction, for other expenses. The effect of a tax deduction of education expenses on this family would be to reduce the cost of private education by 65%.

Consider once again, but from a different angle, the present situation in which education expenses cannot be deducted. How much must the upper-income family earn in order to pay $8,000 per year in private education expenses? In its tax bracket, it would have to earn $24,000 in order to cover the $8,000 private-school expenditure (assuming the $24,000 income is "earned income" and subject to a maximum federal tax of 50% and corresponding maximum state taxes). The federal, state, and local governments would be taking $2 for every $1 the family spent to educate its children in private school.

Our examples have substantially understated the economic incentive for the family to move from the city. The commitment to a private school is not a one-year commitment, but stretches out over 12 to 15 years of nursery, elementary, and high school. Tax consultants estimate the out-of-pocket expenses of a family using only private schools to be in the range of $40,000 to $60,000 per child, or $120,000 to $180,000 of pretax, earned income—if the education expenses cannot be deducted. If it remained in the city, the family with two children would have to spend $250,000 to $333,000 of its earnings for education in private schools.

At present, the alternatives are remarkably attractive. This same family could move to an exclusive suburban school district, invest in a home—a capital investment—the money it would have spent on private schools in the city. The home investment would produce tax deductions that allow the family to shelter a substantial portion of the $250,000 to $300,000 it has to invest over the 15 years or so its children are in public schools. And the family may find its suburban home appreciates in value in that time.

In the suburb, the family can enroll both children in public schools, paying only the taxes on its property. Property taxes are a function of local tax rates and of the assessed value of the property and so cannot readily be projected. Let us assume that the family pays $3,000 per year in property taxes. Of this, 60% to 80% would be assignable to the costs of the public schools, or about $2,400 for both children. This amount would be deductible from the family's taxable income, lowering its tax bracket and saving it about $1,600 in taxes. Thus, the real cost to the family of the suburban public school education would be about $800, or $400 per child.

In summary, under the present tax system, the family must spend $24,000 of its gross income to remain in the city and use private schools, or $800 of gross income (which is the additional tax obligation the family must meet in the suburbs, after federal deductions are accounted) in the suburban public system.

Thus, the tax system has two notable damaging effects. It makes it almost certain that a family would choose suburban public schools over the city's private ones. If the family does opt for the suburbs, that choice also removes from circulation in the city's economy about two times the amount of money a resident family would pay to support private education for its children.

The Tuition Tax Credit Debate

Any change in the federal tax treatment of education expenses will rouse the same objections that surfaced in last summer's congressional debate over tuition tax credits. Any tax reform that removes some disadvantages private schools suffer under the revenue codes touches an ideological nerve in many Americans. Aside from First Amendment arguments (see box, "Tax Reform and the First Amendment"), the principal objections voiced during the debate on tax credits centered on opponents' concern that private schools are elitist and segregationist and succeed at the expense of public schools.

After reviewing the debate and the principal arguments of the tax credit opponents, we will examine the present role of private schools—throughout the nation and in New York City—to see if the schools bear out the fears expressed by the tax credit opposition.

Tax Reform and the First Amendment

One block to careful consideration of reform of the tax rules on education expenses is the assumption that such a reform tries to skirt the First Amendment's prohibition of establishment of religion. During the tuition tax credit debate last summer, this objection drew so much publicity that the actual impact of the proposed tax credits never really received careful attention. Opponents' use of a First Amendment argument stems from their confusing a taxation bill—which the tax credit proposal was—with a programmatic aid bill. The two are substantially different things.

It is the settled practice of Congress to exempt religious organizations from federal taxation, to permit states to exempt them from state taxes, and to allow individuals to deduct religious and other charitable contributions in calculating their taxable income. Until the early 1960s, the IRS allowed parents to deduct "tuitions" to religious schools. Up to that time, 80% of all private schools were tuition-free, that is, they were denominational schools supported by contributions to the church or synagogue. The deductability of these contributions was an accepted practice and did not raise First Amendment problems.

But in the 1960s—ironically, to become eligible for federal funds—most religiously supported schools began to open their doors to students who were not, and whose families were not, church members. In a sense, these schools became more secular. And since they were accepting students whose parents were not church members, and, thus, not contributing to the parish, they began to charge tuitions. The IRS then ruled that these tuitions (as payments for services rendered) are not tax deductible.

As a practical matter, the federal government let parents deduct "tuitions" to religiously affiliated schools until the mid-1960s, when the churches began to limit their contributions to the schools and the schools began to charge tuition. Only then did the IRS prohibit the deductions. Any reform of the tax treatment of education expenses that includes religiously affiliated schools—as the tuition tax credits did—simply restores the situation that existed prior to about 1963.

The tuition tax credit debate, part of the consideration of the Tax Reform Act of 1978, centered on granting "tax credits" to anyone paying tuition. The proposed credit was to equal 50% of tuition, up to a total of $500, and the credit was to be refunded to tuition-paying families whose incomes were too low to incur any federal tax obligation.

The tax credit approach was a progressive form of tax deduction for education expenses (see Table 1). The approach avoids the regressive effects of a pure tax deduction, which gives greater benefits to taxpayers with higher incomes. For example, if a 50%-bracket taxpayer and a 25%-bracket taxpayer both deduct the same amount of tuition, the former gets

TABLE 1: BENEFITS OF PROPOSED TAX CREDIT TO FAMILIES PAYING PRIVATE SCHOOL TUITION BY FAMILY INCOME, 1978

Family Income	Percent of Families	Estimated Median Tuition	Tax Credit	Percent of Income Refunded	Percent of Tuition Refunded
Less than $5,000	3.9%	$ 300*	$150	3.00%	50.0%
$ 5,000-9,999	10.1	250	125	1.25	50.0
10,000-14,999	17.4	300	150	1.00	50.0
15,000-24,999	39.9	500	250	1.00	50.0
25,000-39,999	21.0	1,000	250	0.625	25.0
40,000 & over	7.6	2,000	250	0.60	12.5

Source: U.S. Bureau of the Census, *Survey of Income and Education*, as reported in the *Congressional Record-Senate*, March 20, 1978, pp. S4158-60.

*Estimated median tuition for the lowest income group is more than the next group's because most of the children of the lowest-income families attend denominational schools in the inner-cities where the parishes are smaller and poorer than those that support schools in higher-income areas. The inner-city schools, therefore, must rely more heavily on tuition for their support.

back 50 cents for every dollar deducted, the latter only 25 cents. The pure deduction system is worst for the poorest families because it would not give them any additional benefits.

Tax credit debaters on both sides of the question—perhaps because most of them came from the education profession—did not seem to understand the significance of the tax credit approach. Opponents generally took the position that tax credits were just a ruse to aid private schools by the back door.

The Opposition's Arguments

Education leaders in New York City played particularly important roles in defeating the tuition tax credit bill in the 1978 Congress. The Board of Education instructed its Washington office to work for the bill's defeat; the office sent mailgrams at public expense to the superintendents and community school board members of the city's 32 districts urging them to convey their opposition to tax credits to key members of Congress. The Board of Higher Education also took a position opposed to tuition tax credits.

To organize opposition to the bill, a number of public education lobbying groups formed the Coalition to Save Public Education. Spearheaded by Albert Shanker's American Federation of Teachers (AFT), the coalition members included the National Education Association, the national PTA, and various state and local associations of school administrators. By the time the House committee voted on the bill, the coalition had 700 lobbyists from almost every state working in Washington to defeat the measure.

One major opposition group, the Council of Great City Schools, developed the position of the central cities against this tax reform. The council, which lobbies for the country's 28 largest school systems, has New York City's as its largest and leading member. Unfortunately for the large cities, the council based its opposition on an AFT analysis of the bill's *national* impact. The council performed no independent analysis of the bill's impact on central cities. Nor did New York City's Board of Education, in taking its stand, assess the impact locally.

This was unfortunate because the interests of the 28 largest cities are not identical with those of the teacher unions or even with the other 16,000 school districts in the nation (more than half of which have fewer than 1,000 students) that dominate by sheer numbers the national education lobbying groups.

Both the coalition and the council opposed tax credits to private schools *in principle* on the grounds that private schools (1) are elitist institutions, catering to wealthy clients who do not need aid; (2) are segregationist in their attraction to parents; (3) select the best students, leaving public schools with the most difficult educational problems; and (4) weaken support for the public school systems.

The council itself argued that tax credits would result in private school children receiving more federal aid than public school children. The council claimed the present distribution was $60 for private school students, $128 for public school students.[10] It believed that tax credits would tip the federal aid scale too heavily in favor of private school students. The council was also concerned that the bill would exacerbate the severe problem of declining enrollments in urban public school systems.

Other opponents echoed fears that tax credits would, in practice, mean fewer dollars for public schools and would encourage parents (presumably wealthy ones) to transfer their children to private schools. Some argued that the measure would help only the wealthy because the total potential aid (up to $500 in early versions of the plan) was too small to help lower-income families.

Finally, the broadest opposition argument held that the strength of American public education rested on its being a monopoly and that the slightest encouragement of the competitive private sector would permit parents to indulge their most antidemocratic sentiments and turn against public schools.

We cannot discuss tax credits, then, without considering the reasonableness of these fears. Do the characteristics of the private schools give grounds for them? Would federal appropriations for public education decline as a result of tax credits, and how would such a decline affect public schools? What democratizing aspects of public schools are threatened by encouragement given private schools? Would the wealthy benefit the most from tax credits?

Fears about Private Schools

The fears expressed by opponents of tax credits reflect serious concerns. We can judge the degree to which these fears are warranted only by examining them in the light of enrollment in private schools nationally. What proportion of all students do they enroll? What proportion of the wealthiest? Of the poorest?

Are private schools elitist? In its 1976 *Survey of Income and Education*, the census bureau found that private schools enrolled 10% of all elementary and secondary students (or 4.8 million children), 17% of all students from families whose income was above $25,000, and 6% of all whose family income was below $1,000 (in 1975 dollars).[11] Certainly, private schools enroll a higher proportion of upper-income than lower-income students. Nationally, 58% came from families with above-median incomes, 42% from families with below-median incomes.[12] But the differences are hardly large enough to establish private schools as elitist.

Looked at from the public school side, the 1976 census data show that 83% of all students from the wealthiest families in the country take advantage of free public education. This would indicate great support for American democratic values, *if* these students were in economically *integrated* schools. Certainly there is no great social advantage in providing free, *exclusive* educations to the wealthiest families in the country.

Unfortunately, the wealthiest students are disproportionately enrolled in public schools in places like Shaker Heights, Scarsdale, Marin County, Beverly Hills, Palo Alto, and Chevy Chase—exclusive districts with exclusive schools. A student can attend these schools only by living in the district, and to live in the district the family must be able to afford housing that is among the most expensive in the country. Residence in such a school district requires that a family make a capital investment in a home, an investment typically equal to 25%-40% of the cost of a luxury home.

The implications are startling: The most exclusive schools in America are suburban *public* schools. Enrollment in them is determined strictly by stringent economic criteria, that is, by the family's having enough capital to buy a house in a high-income school district. This economic requirement is surprisingly more severe than those set for admission to private schools serving families with comparably high incomes.

Private schools charge only tuition. In budgetary terms, this is an operating expense. It is far easier to cover this expense than it is to accumulate the capital needed to enter the best suburban systems. Private schools purposely select a certain proportion of students from lower-income families to achieve some degree of socioeconomic mix in their student bodies, and they have scholarship funds for those whose families cannot pay tuition. Fifteen percent of the students in schools belonging to the National Association of Independent Schools (NAIS) receive scholarship aid, and most of these schools charge the highest tuitions in the country.

Wealthy public schools, despite their financial resources, do not offer scholarships to low-income students from outside the district to achieve an economic mix in the student population. Instead, they treat residence in the district as an absolute requirement for admission to the school. Urban, selective, independent, high-tuition private schools provide a far more integrated education experience than their suburban public school rivals. Urban private schools, by removing one of the most powerful factors impelling middle- and upper-income white families to move to suburban districts, help keep the city economically and racially balanced.

Are private schools segregationist? Private schools are not scattered evenly over the country; they are concentrated in cities in the Northeast and the Midwest and are scarcest in Appalachia and the Deep South, regions with the highest concentrations of low-income and minority families. Consequently, national statistics will show a lower percentage of students from these families in private schools than will the figures for some specific regions. In some regions, private schools enroll even greater proportions of low-income and minority students than public schools do in these areas. In 1977, the National Center for Education Statistics found that in the 13 western states (including Alaska and Hawaii) blacks were more likely to use private schools than were whites; 7.4% of all elementary school-age blacks were in private schools compared with only 6.6% of all school-age whites.[13] In more than half the western states, private schools enrolled greater proportions of minorities than did public schools.[14]

Few states have collected reliable data on the racial makeup of private school enrollments. Most information must be drawn from federal surveys. California, however, has now collected data that break down minority enrollments in private schools in the state. The figures show that the largest private school systems in California enroll an equivalent or greater proportion of minority group students than the public system does (Table 2). The Catholic school system in California is 41.3% minority; the public system, 36.5%.

The minority enrollment in the independent schools may appear to be significantly lower than in California's other private schools and much lower than in the public schools. But, given their necessarily high tuitions, these independents have remarkably high percentages of minority students, who are supported principally by scholarships, not by outside aid. The 11% minority enrollment should most properly be compared with the minority enrollments in the public schools in Marin County, Belair, Newport Beach, La Jolla and similar districts serving high-income residents. These districts have only a trace of minority students.

Except for Catholic schools, comparable national data on minority enrollment in private schools are difficult to obtain. Private schools—even those in the same system, such as the Baptist day schools—tend not to collect racial and economic information on their students' families. The Lutheran Church (Missouri Synod) has done so, however, and reports that, nationally, 14% of its elementary and 18% of its high school students are black. The system enrolls a higher proportion of black students than the public schools.

In many communities, the Catholic schools also report high percentages of minority enrollments. In the District of Columbia, 77% of the Catholic elementary school enrollments in 1974-75 were minority students, and the proportion was increasing. In 1973-74, Catholic schools in Mobile, Alabama, reported a 37% black enrollment; Montgomery reported 43%. Minority enrollments were increasing in both districts.

Much of the concern that private schools are racially segregated comes from the experience with southern "segregation academies," which are often pointed to as examples of private schools' tendencies in this direction. These academies, however, are not traditional private schools. They are only a small, recent component of private education in the South, created by public authorities trying to shield public schools from the Supreme Court's desegregation order of 1954.

In the South, the "real" private schools have traditionally been far more integrationist than public schools in the region. Most southern private schools were segregated only after the Berea College case of 1907, in which the Supreme Court said the state could *force private schools to segregate*. When the Supreme Court turned the tables again in the 1950s, many private school systems in the South integrated *before* the public schools in their communities. (These include the Lutheran and Catholic systems of New Orleans and La-

TABLE 2: PERCENT DISTRIBUTION OF ENROLLMENT IN CALIFORNIA PUBLIC AND PRIVATE SCHOOLS BY RACE AND ETHNIC GROUP, 1978-79

School System	American Indian	Asian	Black	Hispanic	Other
Public	0.9%	4.7%*	10.1%	20.8%	63.5%
Catholic (statewide)	0.6	4.9	9.5	26.3	58.9
Lutheran (Missouri Synod)	–	12.0	14.0	2.1	72.9
Lutheran (American)	1.0	2.0	17.0	5.0	75.0
Baptist	0.2	2.4	12.5	8.8	76.1
Episcopal (Los Angeles)	–	9.1	17.0	8.8	65.1
Independent (NAIS)	0.2	4.6	3.5	2.4	89.3

Sources: California Executive Council for Nonpublic Schools; California State Dept. of Education; National Association of Independent Schools (NAIS).
Note: Figures may not add to 100% because of rounding.
*Includes Filipino.

fayette, Louisiana; Montgomery and Mobile, Alabama; and St. Louis, Missouri.)

Whatever the segregating aspects of specific private schools, the available evidence does not support the argument that, in general, private schools segregate racially. The belief that private schools have always been and are elitist, segregating institutions is incorrect.

Private Schools in New York City

Private schools play a far more important role in New York City than they do in most other American communities. The city has about 5% of all private schools in the United States and 7% of all private school students. (The city has 3% of all public and private elementary and secondary students.) In fact, the city has more private schools—almost 1,000—than public schools.

Unfortunately, there are no adequate data describing the family characteristics of New York City's private school pupils. Some data are available from federal programs—most notably the Elementary and Secondary Education Act's (ESEA) Title I (compensatory education). About 14% of the city's private school students are eligible for Title I assistance. Eligibility requirements include both residence in a low-income target area and a substantial reading deficiency. Private school students, tend not to have as severe reading disabilities as public school students, so the 14% figure substantially understates the proportion of private school students from low-income areas.

As we have noted, some information on the income of families sending their children to private schools became available for the first time in the U.S. Bureau of the Census's 1976 *Survey of Income and Education*, in which the bureau asked the same sample population questions about income and private school attendance. A sufficient number of responses were received from New York City families to permit the Foundation for Child Development to estimate the family income of New York City's school-age children. However, the foundation was unable to identify the incomes of the families with children in private schools because the sample did not include enough respondents in this category.

In order to compare the incomes of New York City families using public and private schools, we must, therefore, look at a larger portion of the sample, the Northeast region. (It is reasonable to assume that the Northeast data reflect the situation in New York City; indeed, they present a relatively conservative picture because of the greater proportion of high-income families in the region.) As expected, the data in Table 3 show that private schools have a smaller proportion of low-income families than the public schools and a slightly higher proportion of upper-income families. But what is notable is how similar are the income distributions of the families using the two types of schools. Public and private schools enroll children from families from the same economic spectrum.

As the critics of the tax credit approach suspected, there is some evidence that low-income families are priced out of private schools, but once the income threshold that permits families to pay for private school education is passed, there is a relatively even use of these schools across all income groups, with a slight increase for the highest-income groups. Tax credits would have eliminated the "priced-out" threshold, however, and let lower-income families use private schools almost as readily as lower-middle and middle-income families.

Socioeconomic Characteristics

New York City continues to offer a greater variety of private schools than any other large city in the country. We will look at the socioeconomic characteristics of the families of children in the four largest groups of private schools.

Catholic schools. Catholic schools account for one-third of the city's private schools and two-thirds of its private school enrollment. They report rapidly increasing minority enrollment, which should not be surprising for two reasons: (1) most Catholic schools—and virtually all Catholic elementary schools—are neighborhood schools and are influenced by the same population trends affecting the public schools; and (2) recent Hispanic immigrants are traditionally, if not actively, Catholic. Authorities for both the New York and Brooklyn dioceses report that their enrollments are now over 50% "minority." The New York Archdiocese's minority student population rose from 41% in 1975-76 to 60% in 1977-78.

Catholic schools are heavily concentrated in the inner-city areas of Manhattan, the Bronx, Brooklyn, and Queens. The system identified 47 elementary schools as "inner-city" in Manhattan in 1977. Of the 18,421 students in these schools, 78% were from minority groups. The system identified an additional 30 inner-city schools in the Bronx, for a total of 77 in the inner-city areas of these two boroughs. In 64 of these schools, more than half of the students were from families with incomes below poverty level. In slightly less

TABLE 3 ELEMENTARY AND SECONDARY ENROLLMENT IN NORTHEAST REGION PRIVATE AND PUBLIC SCHOOLS BY FAMILY INCOME, 1975 (numbers in thousands)

Family Income	Total		Private		Public	
	Number	Percent	Number	Percent	Number	Percent
Less than $5,000	842	7.7%	58	3.8%	784	8.3%
$5,000-9,999	1,862	17.1	189	12.4	1,673	17.8
10,000-14,999	2,235	20.5	259	17.1	1,976	21.1
15,000-19,999	2,214	20.3	329	21.7	1,885	20.1
20,000-29,999	2,529	23.2	431	28.3	2,098	22.3
30,000-49,999	998	9.2	196	12.9	802	8.6
50,000 & over	222	2.0	57	3.8	165	1.8
Total	10,902	100.0	1,519	100.0	9,383	100.0

Source: See Table 1.

than half of its inner-city elementary schools (36), the New York Archdiocese reported that more than 85% of the students came from families with below poverty level incomes[15]

Hebrew day schools. The city's second largest group of private schools are the Hebrew day schools (including Solomon Schecter, Torah Umesorah, and yeshivas). These schools enrolled 39,459 students in 1977-78.[16] Although reliable data are not available, school officials estimate that more than half their students come from low-income families. While these schools have virtually no black or Hispanic children, a high proportion of their students are immigrants or the children of recent immigrants. (In recent years, virtually all the Russian Jewish immigrants settling in New York City, estimated at over 10,000 and most with low incomes, reportedly have enrolled their children in Hebrew day schools.)

Only the most formalistic integrationist would argue that the integration of black and Hispanic children with these Eastern European and Middle Eastern minorities is a reasonable solution to the problems of racial integration in the city schools. The integration projected under the Constitution and the civil rights laws involves the minorities with the majority or dominant population.

Other denominational schools. Most of the city's other denominational schools are not neighborhood schools, even when they are attached to a parish. Typically, they are selective in their admissions and draw their students from a wide area of the city. These schools appear to enroll students from families with slightly lower than median incomes and to enroll slightly higher percentages of minority students than do the city's private independent schools. But neither set of schools has compiled and reported reliable family income data, so conclusions are tentative at best.

It is not necessary to enter a detailed argument about the segregative or integrative impact of the denominational schools enrolling large percentages of minorities or immigrants. Clearly, these schools cannot be characterized as racial havens when they enroll minorities. Further, those with high percentages of recent immigrants, such as many Catholic and Hebrew day schools, help stabilize the ethnic communities where they are located and deter families from leaving for the suburbs.

The more interesting questions concern the integrative impact on middle and upper-middle income neighborhoods of the denominational schools, especially the higher-tuition denominational schools, and the selective independent private schools. These schools do tend to enroll a lower proportion of minorities than the public system as a whole and often a lower proportion than are present in the schools' neighborhoods. Consequently, the independent schools often strike casual observers as encouraging the segregation of the city's school population. But it is misleading to compare the record of the independent schools with that of a neighborhood public or private school serving a population with a substantially different socioeconomic composition.

Independent schools. The independent schools should be evaluated against the norm for their principal clients—upper-income families. Are wealthier children in independent schools more racially isolated than wealthier children in public schools? Have the schools taken steps to minimize the racial and economic isolation of their students, and how do their efforts compare with the efforts of public schools serving comparable families?

New York City's independent schools enroll only about 9% of the city's private school students. But these schools are perhaps the most important to our argument because they enroll the students from families with the highest incomes, and they pride themselves on their selectivity (which some critics often perceive as exclusivity). True to their label, New York City's independent schools are not a tightly organized group; they do not collect information for the group as a whole about scholarship aid, minority enrollments, and the like. Many of the independent schools, however, belong to the National Association of Independent Schools, whose recent survey found its members nationally had an average minority group enrollment of 7%.[17] In 1978, the 44 member schools in New York City (with 56% of the city's private school students) had a minority enrollment twice the national average—13.9% (the figure is 25% or more in several of the schools)—and they devote a greater proportion of their school budgets to scholarship aid. Virtually all private schools in the city ensure that their enrollments include students from low-income and minority families.

The alternatives to these private schools are the public schools serving the highest median income districts in the New York metropolitan area. As we have already seen, only 11% of all minorities in the New York area live outside the city, and these are concentrated in a few Westchester communities like Mount Vernon, White Plains, Greenburg District No. 8, and some Long Island and New Jersey towns. Students from upper- and middle-income families who turn from the city's private schools to suburban public schools will be unlikely to attend schools with more than 2% minority enrollments, if that much, and with only a handful of students from lower-income families.

Fears of supporters of public schools that New York City private schools are havens for the wealthy trying to avoid racial and economic integration has not been supported by the statistics describing the socioeconomic characteristics of the private school population in the city. We have enough information from available sources to know that these schools are not elitist, selective institutions. We have seen that private schools contribute to integration in the city, but that the tax system makes it less likely that middle- and upper-income parents will remain in the city and select these schools.

Now we turn to the arguments concerning the direct and indirect fiscal impacts of private schools on the city and on its public schools.

The Fiscal Impact of Private Schools on New York City

The reasoning of the Council of Great City Schools, the supposed defender of the interests of large cities, is worth considering in greater detail. Basically, the council's opposition to tax credits rested on several assumptions that go to the heart of New York City's interest in federal tax reform.

Declining Enrollment

First, the council assumed declining enrollment damages a city's interests. For school administrators, it may cause such problems as underused buildings, oversized staffs that refuse to shrink without a struggle, teacher layoffs, rising teacher costs as younger, lower-salaried teachers are laid off, and a potential loss of state aid based on enrollment. But these are basically problems of management, and not necessarily serious threats to the viability of public school systems in large cities. In essence, declining enrollment means the same resources are available to serve fewer children. According to the National Institute of Education, declining enrollments are forcing schools to become much more flexible and are bringing about "innovative experimentation that [past] federal initiatives (and funds) failed to produce."[18]

Second, the council assumed that private schools would significantly accelerate the decline of public school enrollment. The fact is that by taking students from private schools, the great cities have slowed the decline of public school enrollments caused by falling birth rates and the outmigration of families. The percentage of students enrolled in private schools nationwide has dropped from its peak of 13.6% in 1960 to below 10% today. Catholic schools alone have lost 2.1 million, or 39%, of their students since 1965, while public schools have lost only 3.8% since their peak year in 1970-71.

The public schools have *not* lost students to the private schools. On the contrary, they have gained students from their private school neighbors. Is the council proposing that public policy should facilitate the decline of private school enrollments for the sake of ameliorating declines in urban public schools? A comparison of changes in New York City private and public school enrollments (Table 4) shows that the private schools have suffered a greater decline than the public schools—22% compared with 9% between 1970-71 and 1977-78. Year-by-year data indicate that the decline, which began earlier in the private schools in the late 1960s, did not manifest itself in the public schools until 1972. For a period of at least five years, the public schools' enrollment grew, while the private schools' decline.[19]

Transfers from Private Schools

New York and other large cities should also recognize that a transfer student from a private school in the city does not provide the same benefits as a new resident. The family of the transfer student does not pay additional tax revenue; as a result, the pressure on a city's tax base increases. Although cities do obtain some increase in state aid, it is less than it might appear. They receive virtually no increase in federal aid. Almost all the great cities are in heavily populated states. These states provide less than 50% of the statewide costs of education and typically provide an even lower percentage of the education costs in their largest cities.

Thus, transfers of students from local private schools place greater demands on the local tax base than they do on the state. Even if this were not the case, even if the state provided 60% or more of the total cost of education, the great cities would still have to increase their demands on their own tax resources to accommodate the additional students. Furthermore, the assumption that state aid will increase with enrollment must be modified in another important respect. Only a portion of state aid is dependent on average daily attendance; the rest comes as grants or is based on some portion of the school-age population. New York City officials estimate that almost $300 million of the $800 million the city receives from the state is independent of enrollment in the city's public schools. Ironically, per pu-

TABLE 4 ELEMENTARY AND SECONDARY ENROLLMENT IN NEW YORK CITY PRIVATE AND PUBLIC SCHOOLS, 1970-71—1977-78

Category	1970-71		1977-78		Change	
	Number	Percent	Number	Percent	Number	Percent
PRIVATE SCHOOLS						
Roman Catholic	**325,620**	**21.1**	**222,968**	**16.5**	**(102,652)**	**(31.5)**
Brooklyn Diocese (Brooklyn, Queens)	198,003	12.8	126,787	9.4	(71,216)	(36.0)
New York Archdiocese (Manhattan, Bronx, Staten Island)	127,617	8.3	96,181	7.1	(31,436)	(24.6)
Jewish	**32,770**	**2.1**	**39,459**	**2.9**	**6,689**	**20.4**
Nonaffiliated	6,053	0.4	5,663	0.4	(390)	(6.4)
Conservative	1,312	0.1	1,476	0.1	164	12.5
Orthodox	25,405	1.6	32,320	2.4	6,915	27.2
Other denominational	**15,399**	**1.1**	**17,375**	**1.3**	**1,976**	**12.8**
Lutheran	6,056	0.4	6,727	0.5	671	11.1
Episcopal	4,204	0.3	3,989	0.3	(215)	(5.1)
Greek Orthodox	2,403	0.2	3,001	0.2	598	24.9
Seventh Day Adventist	1,546	0.1	2,151	0.2	605	39.1
Other*	1,190	0.1	1,507	0.1	317	26.6
Independent	**31,413**	**2.0**	**36,674**	**2.7**	**5,261**	**16.7**
PRIVATE SCHOOLS—TOTAL	**405,202**	**26.3**	**316,476**	**23.4**	**(88,726)**	**(21.9)**
PUBLIC SCHOOLS—TOTAL	**1,135,298**	**73.7**	**1,033,813**	**76.6**	**(101,485)**	**(8.9)**
TOTAL ENROLLMENT	**1,540,500**	**100.0**	**1,350,289**	**100.0**	**(190,211)**	**(12.3)**

Source: New York State Education Department, Information Center on Education, March 1979.
*Includes Society of Friends, Baptist, Presbyterian, and Russian Orthodox.

pil state aid for use within public schools would be higher if the city had fewer transfers from private schools.

New York City's public school enrollment peaked in 1971-72 at 1,140,349. Enrollment in 1978-79 was 998,969, a loss of 141,380 students (12.4%). New York State has a "hold-harmless" provision in its state aid formula, by which a district will not receive less aid because of a loss in enrollment than it did in the previous year. Thus, the decline in enrollment does not lower the amount of state aid the city receives. Almost half of all the students in private schools in New York City would have to transfer into public schools before the system would receive any additional state money—assuming the city did not suffer any further declines in its base population.

In summary, because of the hold-harmless provision, the fewer the students, the more funds per remaining student. Transfer students from the private schools reduce the level of *available* aid per pupil. In the past, New York City increased its public school budget in response to the pressures of inflation, a maturing staff earning higher salaries, increased employee benefits, and increased enrollment. Today, under the pressure of its budget troubles, the city has essentially frozen the school system's budget (while providing higher per pupil supports). The portion of the school system's budget provided by the city will not increase with transfers from the private schools. The council's arguments do not apply to New York City. More than that, the assumption that urban public schools suffer from measures that stabilize or enhance the enrollments of private schools is inapplicable in New York City.

Finally, New York City currently covers 62% of the total cost of educating its students from its own tax revenues ($1.73 billion from city sources, $800 million from the state, and $270 million from the federal government in 1978-79). Virtually none of the federal income would change with increased enrollments caused by transfers from local private schools. Federal funds are based principally on the total school-age population; private school pupils already earn federal funds for the public schools. Thus, transfers from private schools increase the drain on the resources of the public schools without appreciably increasing revenues.

Reduced Federal and Local Support for Public Schools

Irrespective of the details of state, federal, and local funding, the council made an argument that requires closer attention: Will aid to private schools reduce support for public schools?

The long-standing argument in Washington over whether private schools should be included in any federal aid has repeatedly tied up passage of any comprehensive education aid program, thereby delaying and limiting the amount of federal money available to public schools. Given this background, it is unlikely that aid proposals at the federal level that exclude private schools will receive more congressional support than they have in the past. Excluding private schools from aid has limited, not increased, federal aid to education.

The council assumes that a dollar for private schools is a dollar siphoned off from the amount available for public schools. But the introduction of tax deductions for all education expenses changes the rules of the game. No critic has suggested that Congress cut any of its existing aid programs for public education in order to fund tax credits. Tax credits do not require any budget allocation, only a budget adjustment.

The council also feared a loss of support at the local level. Here it seriously miscalculated the impact of private schools on central cities, particularly, on New York City. Private schools are businesses and the city receives income from taxes on the economic activity these schools generate and from increased tax revenues from the families who remain in the city, or who move back, to make use of the private schools.

City Revenues from Private Schools

In 1978-79, private schools enrolled 304,346 New York City students, compared with 970,000 in the public system. These private schools constitute a sizable economic enterprise within New York City. In the Catholic system, actual school expenditures (which far exceed tuitions) for operating costs, exclusive of capital costs or depreciation, average $750 to $1,000 per pupil in the elementary schools and $2,000 in the high schools. Costs in other denominational schools are generally higher—about $1,000 per student in unaffiliated inner-city private schools, $2,000 in the Hebrew day schools, and over $3,000 in unaffiliated schools outside the inner city. We can roughly estimate expenditures of about $220 million by the Catholic schools, $100 million by the other denominational schools, and $100 million by the independent schools for a total of $420 million, and the amount may be as high as $500 million. Most of the total is spent on salaries, maintenance, and utilities, generating revenue for the city.

The city's tax income from all sources amounts to about 10% of total personal income in New York City. This figure is higher than the income tax rate because the city's tax income is generated from sales and other taxes as well and because of the multiplier effect, that is, money spent on salaries in the city is taxed as income, taxed when respent by families for goods and services, then taxed as income to businesses, and so on. It is reasonable to estimate that the city receives at least $40 million from the business-related activities of private schools.

A tax deductability of education expenses or a tax credit alone would bring the city substantial additional income. Say a tax credit of 50% of tuition up to $500 per pupil were enacted. The median tuition for Catholic elementary schools in the city is now about $300; for high schools, $700. Median tuitions for almost all other private schools are above $1,000. (We do not include in this estimate the significant number of scholarship students whose tuitions are under $1,000.) In its first year, the tax credit would cover about half the tuition costs of the Catholic schools and a smaller percentage of the higher tuitions of the other private schools. Its initial effect would be to bring about $90 million into New York City's economy.

With the tax credit, most Catholic schools, in the long run, would probably cover a greater proportion of school expenses through tuition. But it is not likely that, after tax credits have been taken, the schools would charge parents effective tuitions higher than before the legislation was passed. Thus, there is a limit on how high tuitions could rise. It is unlikely that a school charging $300 per year could increase its tuition to $1,000 in order to take full advantage of the tax credit, since then parents would be paying $200 more than before the tax credit. In the near future, the city could expect tax credits to bring a total of $125 million annually into its economy and could collect between $10 million and $15 million of this credit through its own tax system.

By retaining families in the city, private schools increase the city's tax revenues. If we conservatively estimate that at least 30,000 of the more than 300,000 private school students belong to separate families with incomes of over $40,000 annually and that these families produce only $6,000 a year in city tax revenues, we find that they account for $180 million a year in city revenues.

The key to this analysis is that schools are extremely important factors in a family's choice of where it lives. Private schools keep in the city many families who would otherwise leave—and they attract many others back from the suburbs (as suggested in recent articles in the local press). Note the enrollment trends cited by Community School Board No. 3 on Manhattan's Upper West Side in its application for federal school integration funds. In one of the most integrated neighborhoods in the country—integrated by income, race, language, household size, religion, and age—the school board stated that more than 50% of the white parents send their children to private elementary schools. As their children reach the middle elementary grades, these parents tend to transfer them to private schools or to move out of the city.

Private schools are not stealing students from the public schools. In fact, as noted earlier, private school enrollment overall has dropped more rapidly than public school enrollment. Rather, a greater proportion of whites who have stayed in the neighborhood are using private schools. Every middle-class New Yorker knows a young family that has moved to Montclair, Scarsdale, or Greenwich when its children reached school age. A disproportionate number of those who stay in the city are using private schools.

And, contrary to popular belief, this pattern of school use helps the city's public schools—in two rather direct and two more subtle ways. First, families able to enroll their children in private schools are more likely to remain in the city and contribute to its economy, while the private schools themselves generate tax dollars for the city's coffers. Consequently, city revenues increase and so resources for public education increase. Further, the proportion of the city's school-age children in private schools is 2.5 times the comparable nationwide ratio. Yet New York City spends more per public school pupil than any other major city—more, in fact, than most of the city's private schools. There is no evidence supporting the notion that the more people use private schools, the less willing they are to support public schools. Families willing to invest much of their income in education are willing generally to support education tax measures.

Second, the public schools are relieved of the burden of additional students at a time when education budgets are tight. This is especially important for the future since more students will not increase state per pupil funding because of the hold-harmless provision noted earlier.

Third, in many parts of the city, families split their children between public and private schools. In Brooklyn in particular, Catholic elementary schools feed their students into public junior and senior high schools. To an extent, many private schools function as part of the public system of education in the city as students move back and forth between the two systems.

Fourth, the private schools often set standards against which public schools are measured. Particularly in the inner city, competition between private and public schools encourages the best from both. District 3, for example, openly competed with private schools on the West Side—obtaining federal funds to widen the variety of its curriculum offerings—in an attempt to attract new enrollment from white families. The new flexibility benefited all the children in the district. Competition is especially important as a device for improving a system as large as New York City's public system, because all recent political reforms of the public schools have not been able to improve school quality quickly enough to affect the children whose parents were pressing for the improvements—within the three to six years children spend at each level of the city's public schools.

Educational Benefits from Private Schools: The Inner City

The New York City Board of Education has an obligation to provide the best education possible for all children in the city, especially children from minority and low-income families. Inner-city parents generally know—and state achievement test results show—that private schools in the inner city, on average, graduate students with higher achievement levels than the public schools in the same neighborhoods. Inner-city private schools also post absentee rates averaging 5%, compared with the public system's 17% rate citywide and 35% rate in the inner city. Good schools do not just offer services; they must encourage children to want to learn. The absentee rates of the two types of schools are evidence of at least some success of private schools in the inner city.

This is *not* to say that there are no excellent public schools in the inner city. Whenever partisans discuss the relative merits of public and private schools, they tend to fall into two traps. One argument assumes that all private schools are better than all public schools. This is not the case, not even in the inner city, where private schools do better *on average*. The other argument holds that private schools' superior achievement is a simple matter of (1) higher socioeconomic status of their students (socioeconomic status being the major factor related to school achievement); (2) the selection or expulsion practices of the schools; or (3) the self-selection by the parents. None of these three assumptions is true, either.

First, the socioeconomic status of private and public school students in most inner-city neighborhoods is not appreciably different, and the minor differences are not sufficient to explain the difference in achievement found in graduates of the two types of schools. Both public and private schools are pulling students from the same low-income neighborhoods in the inner city.

Second, inner-city private schools have virtually no selection process. (Indeed, discovering the superior inner-city students, given a large preschool population with language difficulties and many families who do not speak English, would be very hard to do.) As far as expulsion is concerned, these schools simply do not exercise that authority often enough to account for the difference in median achievement rates. Their use of expulsion is quite rare, in fact, and many schools do not expel any child in the course of a school year. And expulsion is *not* the prerogative of the private schools; public schools exercise de facto, if not de jure, expulsion simply by ignoring students they consider troublesome—hence, their astronomical absentee and dropout rates.

Third, the superior achievement of private school students in the inner city can be attributed, to some extent, to deliberate selection of the school by parents with greater academic ambitions for their children. But this cannot be a substantial reason. There are many public schools in inner-city neighborhoods in which there are no private schools. Where are the children of the more supportive parents in these areas except in public school?

Furthermore, national survey data report that parents of inner-city *public* school children put great emphasis on the importance of education for the success of their children. They put more emphasis, in fact, than middle-class parents do. The explanation cannot be that public schools lack sufficient numbers of parents who support education strongly.

And, of course, the fact that the most ambitious inner-city parents would choose private schools—even if true—must be surprising. Inner-city private schools typically spend 25% to 33% of the amount spent per pupil by public schools. (In one inner-city neighborhood, we found a private school operating on 10% of the budget of the nearby public school and still outperforming that school.[20]) Not only do they spend less, but elementary private schools also have a higher pupil-teacher ratio—in New York City, 32:1 compared with the public system's 25:1. And most have austere settings, virtually no special equipment, and a relative scarcity of library books. On their face, most private schools would not be the obvious choice of parents seeking a superior education for their children.

Still, inner-city private schools have a reputation for performing well. Examining a matched sample of public and private school students in the inner city, Gregory Hancock found that the average private school child entered first grade with a slightly lower I.Q. than his public school counterpart, but by the sixth grade he was reading one and a half to two years ahead of the public school pupil.[21]

There is no argument that private schools could or should replace public schools in the inner city or elsewhere. But the New York City Board of Education should recognize that many private schools do offer the educational quality, especially in the inner city, that it is the board's responsibility to provide for public school children. It seems wasteful to let the inner-city private schools close because they cannot be financed, without fighting for tax measures that would alleviate their financial plight. It is an odd position for the champions of quality education for the least advantaged in our city to oppose the single piece of federal legislation most likely to preserve many of the best inner-city schools.

Notes

1. Trude W. Lash, Heidi Sigal, and Deanna Dudzinski, *Children and Families in New York City: An Analysis of the 1976 Survey of Income and Education* (New York: Foundation for Child Development, February 1979), pp. 44-45.

2. The proportion of the loss of white families attributable to their flight to the suburbs has been extrapolated from calculations made by Milton Bins and Alvin H. Townsel for the Council of Great City Schools of the components of the rise in the proportion of minority group residents in New York City's population between 1950 (9.8%) and 1970 (22.8%). They found lower birth rates among whites to be almost equally as important as white outmigration. Lower white birth rates reduce both white family size and the number of white families with school-age children; hence, outmigration must play a relatively large role in the absolute decline in the number of white families.

Milton Bins and Alvin H. Townsel, "Changing/Declining Enrollments in Large City School Systems," in Susan Abramowitz and Stuart Rosenfeld, eds., *Declining Enrollment: The Challenge of the Coming Decade* (Washington, D.C.: National Institute of Education, U.S. Government Printing Office, March 1978), pp. 136-37, Table 4.4.

3. Ibid., p. 138. Consistent evidence of migration related to school age has been reported by Harry H. Long and Paul C. Glick, "Short Paper: How Racial Composition of Cities Changes," *Land Economics*, August 1975, pp. 258-67.

4. Lash et al., *Children and Families in New York City*, p. 30, Table I-3.

5. Ibid., p. 106, Table IIIb-1a.

6. Bins and Townsel, "Changing/Declining Enrollments," p. 140, Table 4.6.

7. William H. Frey, "Class-specific White Flight: A Comparative Analysis of Large American Cities," Institute for Research on Poverty Discussion Papers, No. 507-78 (Madison: University of Wisconsin, October 1978), p. 1.

8. Janet Rothenberg Pack, "Determinants of Migration to Central Cities," *Journal of Regional Science*, 13, pp. 249-60.

9. The author wishes to acknowlege the valuable suggestions of tax consultants Harry A. Skydell, C.P.A., of Skydell Shatz and Co., and Warren Lieberman, C.P.A., of Louis Lieberman and Co. Any errors in this discussion are solely the author's responsibility.

10. The council's estimate of current federal aid to private schools was incorrect. New York City's public school system receives direct federal aid of almost $300 per pupil; private schools receive no direct aid.

Most recent federal education aid programs, including ESEA Title I (compensatory education), follow a child-benefit approach by which students are entitled to receive aid regardless of the type of school they attend. However, the federal funds for these programs are given to the public school systems, not the individual private schools. The public system hires the teachers, plans the programs, and delivers the services to the private school students. Private schools have no direct control over funds, teachers, or programs. In most cases, it is as if the private school students were enrolled in a public system's afterschool program. So it is misleading to attribute the total value of services delivered to individual private school students as "aid to private schools."

Furthermore, the $60 figure is not even an accurate estimate of the value of services delivered to private school students. The U.S. Department of Health, Education, and Welfare cannot state in any systematic fashion the dollar value of services actually being delivered to private school students. In three states, authorities have refused to deliver *any* services to private school students.

11. U.S. Bureau of the Census, *Survey of Income and Education*, as reported in the *Congressional Record Senate*, March 20, 1978, pp. S4158-60, Table 1B.

12. National Center for Education Statistics, *The Condition of Education, 1977*, Vol. 3, Part 1 (Washington, D.C.: U.S. Government

Printing Office, 1970), pp. 74, 77.

13. Ibid., p. 192, Table 4.05.

14. U.S. Department of Health, Education, and Welfare, Office of Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Groups* (Washington, D.C.: U.S. Government Printing Office, Fall 1977).

15. Robert G. Hoyt, "Learning a Lesson From the Catholic Schools," *New York*, Sept. 12, 1977, as reprinted in *Tax Treatment of Tuition Expenses*, Hearings Before the Committee on Ways and Means, House of Representatives, 95th Congress, Second Session, Feb. 14-17, and 21, 1978, Serial 95-56 (Washington, D.C.: U.S. Government Printing Office, 1978), pp. 365-70. See also Edward B. Fiske, "Catholic Schools Attain Stability in Urban Crisis," *New York Times*, Oct. 9, 1977.

16. Donald A. Erickson, Richard L. Nault, and Bruce Cooper, assisted by Robert Lamborn, "Recent Enrollment Trends in U.S. Nonpublic Schools," in Abramowitz and Rosenfeld, *Declining Enrollments*, p. 86, Table 3.2.

17. Ibid., p. 111; also William Dandridge, unpublished memo (National Association of Independent Schools, May 23, 1979).

18. Abramowitz and Rosenfeld, *Declining Enrollments*, p. 452.

19. James Brady, "Enrollments in Nonpublic New York City Schools, 1970-1978," unpublished memo (New York State Education Department, Information Center of Education, March 1979).

20. Thomas Vitullo-Martin, Julia Vitullo-Martin, and Glenn Paanen, *Parents, Policies, and Political Structures in Nonpublic Schools*, research supported by a basic research grant from the National Institute of Education, forthcoming, Summer 1979.

21. Gregory Hancock, "Public School, Parochial School: A Comparative Analysis of Governmental and Catholic Elementary Schooling in a Large City" (Ph.D. diss., University of Chicago, 1971), p. 54.

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Note to Readers

City Almanac apologizes for the lengthy delay in publishing this issue. The editors plan to accelerate the preparation of subsequent issues in order to bring *City Almanac* back on schedule with Vol. 14, No. 2 (August 1979).

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DESCRIPTION OF S. 103 AND S. 449
RELATING TO
TAX-EXEMPT STATUS
OF
PRIVATE SCHOOLS

PREPARED FOR THE USE OF THE
COMMITTEE ON FINANCE
BY THE STAFF OF THE
JOINT COMMITTEE ON TAXATION

I. INTRODUCTION

The Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance has scheduled a hearing on April 27, 1979, on the tax-exempt status of private schools.

This pamphlet has been prepared by the staff of the Joint Committee on Taxation to provide background information in connection with the hearings. The pamphlet includes a description of the revised Revenue Procedure proposed by the Internal Revenue Service for determining whether certain private schools discriminate racially and, therefore, are ineligible for tax-exempt status. In addition, related legislative proposals and issues presented by both the proposed IRS guidelines and the legislation are outlined.

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II. SUMMARY

Tax-exempt schools

The Internal Revenue Code provides tax-exempt status under section 501(c)(3) for organizations which are "organized and operated exclusively for religious, charitable, . . . or educational purposes." Exempt organizations are entitled to receive contributions which are deductible by their donors under section 170. Both the Internal Revenue Service and the Federal courts have required that schools be racially nondiscriminatory in order to qualify as tax-exempt organizations under section 501(c)(3) and as charitable donees under section 170(b).

In 1971, a 3-judge Federal district court panel issued a permanent injunction against the Internal Revenue Service requiring it to deny tax exemptions to private schools which discriminate racially with respect to students.[1] Subsequently, the Internal Revenue Service's procedures were challenged by the *Green* plaintiffs as inadequate for determining whether private schools discriminate racially and, thus, inadequate for fulfilling the injunction's requirements. The IRS itself decided that existing procedures were insufficient and that more effective ones were necessary.

Proposed revenue procedure

On February 9, 1979, the Internal Revenue Service issued, in proposed from, a Revenue Procedure containing guidelines for determining whether certain private schools discriminate racially and therefore are ineligible for tax-exempt status.[2] The procedure would apply to two categories of private elementary and secondary schools. The first group consists of adjudicated schools, which have been found to be racially discriminatory by a Federal or State court or by a Federal or State administrative agency. The second category contains reviewable schools. A reviewable school generally is a school whose formation or substantial expansion was related to public school desegregation in the community and which lacks significant minority student enrollment. The proposed guidelines would require that determinations about whether schools have racially nondiscriminatory policies with respect to students be based on all applicable facts and circumstances. An administrative "safe harbor" would be established so that schools whose minority enrollment is 20 percent (or more) of the percentage of minority school age population in the community ordinarily would not be reviewable. The guidelines also would provide a non-exclusive list of factors tending to show whether a school's formation or expansion was related to public school desegregation, as well as whether a reviewable school should be tax-exempt because it has made a good faith effort to attract minority students. The guidelines set forth procedures for handling revocations of exempt status, new applications for tax-exemption, and IRS National Office review of adverse determinations.

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[1] *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1971).

[2] This proposed procedure is a revision of a proposal published in the Federal Register on August 22, 1978.

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Legislative proposals

Several legislative proposals have been introduced in response to the IRS guidelines on tax-exempt schools. One bill (S. 103) would bar implementation of the proposed procedure, as well as any similar regulations, rulings, or guidelines. Another bill (S. 449) would amend section 501 with a new statutory provision finding that tax-exempt status under section 501(c)(3) and the deductibility of contributions to a section 501(c)(3) organization, such as a private school, shall not be construed as the provision of Federal assistance.

Issues

In addition to questions of administrative authority and feasibility, the proposed guidelines and the legislation introduced in their wake involve issues of Constitutional significance. Because many private schools are religious or church-affiliated, First Amendment issues arising under the Free Exercise and Establishment clauses confront the constitutional guarantees of racial equality. Because the guidelines were developed in the context of a Federal court injunction, the doctrine of the separation of powers under the Constitution also may be relevant.

III. BACKGROUND

A. Requirements for Tax Exemption

Section 501(c)(3) of the Internal Revenue Code provides for the exemption from Federal income tax of organizations "organized and operated exclusively for religious, charitable * * * or educational purposes." A primary or secondary school which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on may qualify as a tax-exempt educational organization, if it otherwise meets the requirements of section 501(c)(3) (Treas. Reg. sec. 1.501(c)(3)-1(d)(3)(ii)).

Under the common law, the term "charity" encompasses all three of the major categories identified separately under section 501(c)(3) as religious, charitable, and educational. Both the courts and the Internal Revenue Service have determined that the statutory requirement of being organized and operated exclusively for religious, charitable, or educational purposes was intended to express the basic common law concept of charity. Therefore, a school claiming a right to the benefits provided by section 501(c)(3), as being organized and operated exclusively for educational purposes, must be a common law charity in order to qualify for exemption under that section.

Section 170 allows an income tax deduction for a charitable contribution, as defined in section 170(c), if payment is made within the taxable year. Under section 170(c), the term "charitable contribution" includes a contribution or gift to, or for the use of, an organization which is organized and operated exclusively for educational purposes. Thus, a private school which is exempt from tax under section 501(c)(3) of the Code is entitled to receive contributions which are deductible by their donors. However, section 170 applies only to contributions or transfers to organizations whose purposes are charitable in the generally accepted legal sense or to contributions for purposes that are charitable in the generally accepted legal sense.[1]

An organization seeking recognition of exempt status under section 501 is required to file an application with the District Director of Internal Revenue for the district where the principal place of business or principal office of the organization is located. A ruling or determination letter will be issued to an organization by the Internal Revenue Service if the organization's application and supporting documents establish that it meets the particular requirements of the section under which exemption is claimed. Exempt status will be recognized in advance of an organization's operations if proposed operations can be described in sufficient detail to permit a conclusion that the organization will meet the particular requirements of the section under which exemption is claimed. In order to qualify for exemption, the organization is required to describe fully the activites in which it expects to engage, including the standards, criteria, procedures, or other means adopted or planned for carrying out the activities; the anticipated source of receipts; and the nature of contemplated expenditures.[2]

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[1] Rev. Rul. 67-235, 1967-72 C.B. 113. The same definition of charitable also applies for purposes of the deduction allowed in determining Federal estate and gift taxes (secs. 2055, 2106(a)(2) and 2522).

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[2] See Rev. Proc. 72–4, 1972–1 C.B. 706.

B. Court Challenges to Exempt Status of Private Schools

Racial discrimination in public education was held to be illegal and contrary to public policy in the Supreme Court decision of *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Shortly after the decision in *Brown*, there were suggestions for the creation of private school systems to take the place of public school systems, which some States had threatened to abolish rather than desegregate. Efforts to establish private schools (so-called "segregation academies") in opposition to public school desegregation began in the early and mid-1960's, and were an integral part of the "massive resistance" legislation enacted by some States.

In 1970, Negro parents of school children attending public schools in Mississippi brought a class action to enjoin United States Treasury officials from according tax-exempt status from allowing deductions for and contributions to private schools in Mississippi discriminating against black students. In *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C. 1971), *aff'd per curiam sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1971), the court held that racially discriminatory private schools are not entitled to the Federal tax exemption provided for educational institutions and that persons making gifts to such schools are not entitled to the deductions provided in the case of gifts to educational institutions. The court placed the IRS under a permanent injunction to deny tax exemption to private schools in Mississippi that practice racial discrimination with respect to students, and ordered the IRS to implement its decision by requiring such schools to adopt and publish a nondiscriminatory policy and to provide certain statistical and other information to enable the IRS to determine if the schools are racially discriminatory.

While the injunction granted in *Green* applied only to Mississippi private schools, the court stated that the "the underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt."[1]

Efforts by some States to provide State support to so-called "segregation academies" continued until recent years. The United States Department of Justice has been involved in extensive litigation to enjoin such State support.[2] As recently as 1973, the United States Supreme Court, in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), struck down a Mississippi law to the extent that it provided for textbooks and transportation to students attending private, racially discriminatory schools. On remand in *Norwood*, 382 F. Supp 921 (N.D. Miss., 1974), the district court imposed a certification process to determine which private schools were racially discriminatory and, therefore, ineligible for State textbooks and transportation aid. The court stated that a prima facie case of discrimination arises from proof "that the school's existence began close upon the heels of the massive desegregation of public schools within its locale, and that no blacks are or have been in attendance as students and none are or have ever been employed as teacher or administrator at the private school." [3]

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[1] 330 F. Supp. at 1174.

[2] See, e.g., *Graham and United States* v. *Evangeline Parish School Board*, 484 F. 2d 649 (C.A. 5, 1973); *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss.) *aff'd* 440 F. 2d 377 (C.A. 5, 1971); *United States* v. *Mississippi*, 499 F. 2d 425 (C.A. 5, 1974).

In *Prince Edward School Foundation* v. *Commissioner*, Civil Action No. 78-1103 (D.C. D.C.), a declaratory judgment action decided on April 18, 1979, a Federal district court held that a nonprofit, private elementary and secondary school failed to meet its burden of establishing its qualification for tax-exempt status under section 501(c)(3). The court relied on the *Green* decision that racially discriminatory private schools are not entitled to the favorable tax treatment provided to section 501(c)(3) organizations. The court ruled that the school did not establish that its admissions policy was racially nondiscriminatory and stated that the Internal Revenue Service acted properly in revoking the school's exempt status. The court noted that the facts and circumstances surrounding the school's establishment supported the inference that the school followed a racially discriminatory admissions policy, notwithstanding the fact that the school never received an application from, and thus never denied admission to, a black student.

In *Brumfield and United States* v. *Dodd*, 425 F. Supp. 528 (E.D. La., 1976), a State program for textbook and transportation aid similar to the one considered in *Norwood* was enjoined and a similar certification process was imposed.

In 1976, the Supreme Court held, in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), a case involving a proprietary, nonsectarian school which denied admission to black students, that the 1866 Civil Rights Act made it illegal for a school to deny admission to black students. This decision is applicable to a school without regard to whether it receives any Federal or State aid, and thus broadens the public policy against racial discrimination in private schools.

With regard to private religious schools, a recent district court decision, *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), held that a private school is not entitled to tax exemption notwithstanding the religious belief on which its racially discriminatory admissions policy rests. The court in that case stated:

"There is a legitimate secular purpose for denying tax exempt status to schools generally maintaining a racially discriminatory admissions policy. Moreover, the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion. Finally, the policy patently avoids excessive governmental entanglement with and, in fact, prevents indirect government aid to, religion."[4]

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[3] 382 F. Supp. at 924–5. The *Norwood* decision also provides examples of evidence which a school may offer to rebut an inference of discrimination:

> "School officials may, therefore, overcome a prima facie case against their school by proof of affirmative steps instituted by the school to insure the availability of all of its programs to blacks who may choose to participate. Illustrative steps of this type would certainly include proof of active and vigorous recruitment programs to secure black students or teachers, including student grants-in-aid, proof of continued, meaningful public advertisements stressing the school's open admissions policy, proof of communication to black groups and black leaders within the community of the school's nondiscriminatory practices, and similar evidence calculated to convince one that the doors of the private school are indeed open to students of both the black and white races upon the same standards of admission." 382 F. Supp. at 926.

On the other hand, in *Bob Jones University* v. *United States*, Civ. No. 76-775 (D.S.C., filed Dec. 26, 1978), a district court held improper the revocation by the IRS of the tax-exempt status of a religious university allegedly practicing racial discrimination. The discrimination issue involved in that case was whether the university's policy of not admitting racially mixed couples rendered it ineligible for tax exemption. The government is appealing this decision.

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[4] 436 F. Supp. at 1320.

C. Internal Revenue Service Response to *Green* v. *Connally*

1. Prior rulings and procedures

Pre-1970

The Internal Revenue Service suspended the issuance of rulings to private schools in 1965 in order to consider the effect of racial discrimination on the tax-exempt status of private schools. In 1967, the IRS announced its position that racially discrminatory private schools, which were receiving State aid, were not entitled to tax-exempt status.[1]

Prior to 1970, the position of the IRS was to recognize the tax-exempt status of racially discriminatory private schools that did not receive State aid. However, this policy was challenged in *Green* v. *Connally*, which held that racially discriminatory private schools are not entitled to tax exemption under section 501(c)(3). During the pendency of litigation in *Green* v. *Connally*, the IRS announced the position that racially discriminatory private schools are not entitled to tax exemption (whether or not receiving State aid).[2]

1970–1971

Since 1970 and the *Green* decision, the Internal Revenue Service has taken a number of steps to implement the nondiscrimination requirement. In 1971, the IRS published Revenue Ruling 71–447, 1971–2 C.B. 230, which explained the nondiscrimination requirement. That ruling held that a private school which does not have a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3), and in other relevant Federal statutes, and, accordingly, does not qualify as an organization exempt from Federal income tax. The term "racially nondiscriminatory policy as to students" was defined to mean that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

1972 Revenue Procedure

In 1972, the Internal Revenue Service published Revenue Procedure 72–54, 1972–2 C.B. 834, which set forth guidelines for determining whether certain private schools which have rulings recognizing their tax-exempt status, or which are applying for recognition of exemption under section 501(c)(3), have adequately publicized their racially nondiscriminatory policies as to students. The Revenue Procedure provided that a showing that the school does in fact have a meaningful number of students from racial minorities enrolled is evidentiary of

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[1] IRS News Release, August 2, 1967.

[2] IRS News Release, July 10, 1970.

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a nondiscriminatory admissions policy. However, the 1972 procedure stated such a showing will not in itself be conclusive that the school has a racially nondiscriminatory policy as to students. A school that did not establish that it operated under a bona fide racially nondiscriminatory policy as to students was required, in order to qualify for exemption, to take affirmative steps to demonstrate that it would so operate in the future. The school was required to show that a racially nondiscriminatory policy as to students had been adopted; that the policy had been made known to all racial segments of the community served by the school; and that the policy was being administered in good faith.

Revenue Procedure 72-54 provided several examples of methods by which publication of a school's nondiscriminatory policy could be made. The procedure did not require the use of any particular method, so long as the method chosen effectively made the policy known to all racial segments of the community served by the school. Examples of methods that the IRS would consider as meeting the publication requirement included the publication by a school of notice of its racially nondiscriminatory policy in a newspaper of general circulation serving all racial segments of the locality from which the school's student body is drawn: the use of broadcast media by a school to publicize its racially nondiscriminatory policy; the publication of a school's nondiscriminatory policy through its school brochures and catalogues; and communication by the school of its nondiscriminatory policy to leaders of racial minorities in such a way that they, in turn, would make the policy known to other members of their race.

1975 Revenue Procedure

In 1975, the U.S. Commission on Civil Rights criticized the absence of specific Internal Revenue Service guidelines to identify schools which should be examined and to determine whether schools are discriminatory. The Internal Revenue Service subsequently published Revenue Procedure 75-50, 1975-2 C.B. 587, which set forth guidelines and recordkeeping requirements for determining whether private schools applying for recognition of exemption under section 501(c)(3), or presently recognized as exempt from tax, have racially nondiscriminatory policies.

In general, the guidelines in Revenue Procedure 75-50 are as follows:

(1) A school must include a statement in its charter, bylaws, or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and, therefore, does not discriminate against applicants and students on the basis of race, color, or national or ethnic origin.

(2) Every school must include a statement of its racially nondiscriminatory policy as to students in all its brochures and catelogues dealing with student admissions, programs, and scholarships.

(3) The school must make its racially nondiscriminatory policy known to all segments of the general community served by the school.

(4) A school must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

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(5) As a general rule, all scholarships or other comparable benefits procurable for use at any given school must be offered on a racially nondiscriminatory basis. Their availability on this basis must be known throughout the general community being served by the school and should be referred to in the publicity necessary to satisfy the third requirement in order for that school to be considered racially nondiscriminatory as to students.

The procedure also requires an individual authorized to act officially on behalf of a school which claims to be racially nondiscriminatory as to students to certify annually, under penalties of perjury, on a form issued by the IRS, that to the best of his knowledge and belief the school has satisfied the requirements listed in the procedure.

The 1975 Revenue Procedure further provides that the existence of a racially discriminatory policy with respect to employment of faculty and administrative staff is indicative of a racially discriminatory policy as to students. Conversely, the absence of racial discrimination in employment of faculty and administrative staff is indicative of a racially nondiscriminatory policy as to students.

Failure to comply with the guidelines set forth in Revenue Procedure 75-50 ordinarily will result in the proposed revocation of the tax-exempt status of a school.

1975 Revenue Ruling

In 1975, the Internal Revenue Service also published a Revenue Ruling clarifying the Service's position that private schools operated by churches, like other private schools, may not retain tax-exempt status if they are racially discriminatory.[3] Revenue Ruling 75-231, 1975-1 C.B. 158, held that church-related and church-operated organizations conducting schools with policies of refusing to accept children from certain racial and ethnic groups will not be recognized as tax-exempt charities under sections 170 and 501(c)(3). The IRS found that there was no basis for treating such schools differently from other private schools not affiliated with a church. The ruling further held that the disqualification of the tax-exempt status of a church-related school, organized as a separate entity under the auspices of a church, will not affect the tax-exempt status of the organization qualifying as a church. The disqualification of the tax-exempt status of a church-related school, which is not separately incorporated and is directly supervised and controlled by a church that requires the school to maintain a racially discriminatory policy as to students, will render the organization, as a whole, noncharitable.

2. Reopening of *Green* v. *Connally* and issuance of proposed Revenue Procedure

In 1976, the plaintiffs in the *Green* case reopened that suit, asserting that the Internal Revenue Service was not complying with the court's continuing injunction that Mississippi private schools which are racially discriminatory be denied exemption from Federal income tax.[4] In addition, a companion suit was filed, asserting that the Service's enforcement of the nondiscrimination requirement, on a nationwide basis, has been ineffective.[5] These two cases are now pending.

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[3] This position is in accord with a later district court decision. See, *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314, (E.D.N.C. 1976).

[4] *Green* v. *Blumenthal*, No. 1355-69 (D.D.C.).

This recent litigation prompted the Internal Revenue Service to review the adequacy of its policies and procedures relating to the tax-exempt status of private schools. The Internal Revenue Service concluded that its procedures have been ineffective in identifying schools which, in actual operation, discriminate against minority students, even though those schools may profess an open enrollment policy and may comply with the annual publication requirements of Revenue Procedure 75–50.

The Internal Revenue Service concluded that, as a result of its current procedures, the tax exemption of a school which adopts a nondiscriminatory policy in its governing instrument, and publishes this policy annually, is likely to remain undisturbed unless some overt act of discrimination is brought to the Service's attention.

After reviewing the relevant court decisions, the standards used in those decisions, and its existing guidelines, the Internal Revenue Service concluded that more specific guidelines were needed in order to focus on certain schools' actual operations, for the purpose of determining if their actual practices conform to their asserted policies. The Internal Revenue Service developed and published, in proposed form, new guidelines for use in reviewing a private school's racial policy on August 21, 1978. These proposed guidelines were revised in 1979. The revised version is discussed in the following part.

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[5] *Wright* v. *Blumenthal*, No. 76–1426 (D.D.C.).

IV. IRS PROPOSED REVENUE PROCEDURE

A. What is a Revenue Procedure?

The Internal Revenue Service's Revenue Procedure program is closely related to its rulings program. Prior to 1955, it was IRS practice to issue I.R.-Mimeographs and I.R.-Circulars, as well as similar documents, which contained information on internal management practices affecting taxpayers. In order to consolidate this practice, and to bring together all announcements relating to internal procedures, the IRS created the Revenue Procedure series.

In Revenue Procedure 55–1, 1955–2 C.B. 897, the Internal Revenue Service announced its policy to publish all statements of practice and procedure issued for internal use, which affect rights and duties of taxpayers or other members of the public under the Internal Revenue Code and related statutes, in the form of Revenue Procedures in the Internal Revenue Bulletin.

Revenue Procedures also are used to inform taxpayers of instructions given to IRS personnel for use in audit. In this context, Revenue Procedures are used to promulgate rules of convenience, that is, rules which set guidelines enabling the IRS to simplify audits in many areas.

B. Chronology of Proposed Revenue Procedure

1. Original issuance

On August 21, 1978, the Internal Revenue Service announced prospective publication of a "Proposed Revenue Procedure on Private Tax Exempt Schools," designed to revise administrative guidelines for determining whether a private school operates in a racially nondiscriminatory manner (I.R. News Release 2027). The procedure dealt primarily with two classes of private elementary and secondary schools: (1) schools adjudicated to be discriminatory, and (2) schools which were formed or substantially expanded at the time of public school desegregation and which have little or no minority enrollment. Under the proposed procedure, these two classes of schools would have been reviewed administratively and would have been required to make special showings to rebut indications of racial discrimination.

The procedure was published in proposed form because the IRS recognized the difficult nature of its undertaking and its inability to predict the proposed procedure's impact in varying circumstances. For this reason, the IRS solicited public comment about adjustments and modifications which might be appropriate.

2. IRS hearings and issuance of revised proposed procedure

The Internal Revenue Service received numerous comments on the proposed procedure and conducted public hearings on it on December 5, 6, 7, and 8, 1978. After reviewing the written and oral comments, the IRS modified the proposed revenue procedure and issued a revised proposed revenue procedure on February 9, 1979 (I.R. News Release 2091).

The revised procedure is more flexible than the original and differs from it in several respects. For example, the revised procedure does not apply to schools which are not alternatives to desegregated public elementary and secondary schools. It is inapplicable to colleges, universities, nursery schools, or schools for the handicapped or emotionally disturbed. The revised procedure also gives greater consideration to each school's particular circumstances than did the original version, in order to avoid administrative denials of exemption to schools that are not, in fact, racially discriminatory.

C. Explanation of Proposed Revenue Procedure

1. Purpose

The proposed Revenue Procedure, as revised by the IRS, sets forth guidelines for the Internal Revenue Service to apply in determining whether certain private schools have racially discriminatory policies as to students and, therefore, are not qualified for tax exemption under section 501(c)(3).

The Internal Revenue Service believes that a school's formation or expansion at the time of public school desegregation in the community may cast doubt on the existence of a bona fide racially nondiscriminatory policy. In such situations, the mere assertion and publication of a nondiscriminatory policy may be insufficient to demonstrate bona fide nondiscriminatory operation. It is with such situations that the proposed procedure is primarily concerned. Relying on *Norwood* v. *Harrison* and *Brumfield* v. *Dodd*, the IRS published the proposed procedure in the belief that a private school's formation or expansion at the time of public school desegregation in the community makes it appropriate to examine whether actions have been taken by the school to overcome the indications that it was established to foster racial segregation and that it discriminates against minorities.

The proposed procedure sets forth guidelines to identify certain private elementary and secondary schools that are, in fact, racially discriminatory even though they may claim to have a racially nondiscriminatory policy as to students.

2. Coverage

The proposed Revenue Procedure applies to private elementary and secondary schools, other than schools organized and operated solely for the education of the handicapped or the emotionally disturbed. For example, the procedure would apply to church-related and church-operated elementary and secondary schools, but would not apply to colleges and universities, pre-schools, nursery schools, or schools for the blind or the deaf.[1]

3. Categories of affected schools

The proposed Revenue Procedure is intended to apply to two categories of private schools: (1) schools adjudicated to be discriminatory and (2) reviewable schools.

A school "adjudicated to be discriminatory" is defined as any school found to be racially discriminatory as to students by a final decision of a Federal or State court of competent jurisdiction; by final agency action of a Federal administrative agency in accordance with the procedures of the Administrative Procedure Act, 5 U.S.C. 551, *et. seq.*; or by final agency action of a State administrative agency following a proceeding in which the school was a party or otherwise had the opportunity for a hearing and an opportunity to submit evidence. Final decisions and actions mean no further administrative or judicial appeal can be taken.[2]

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[1] The guidelines contained in the original version of the proposed procedure, while generally applicable only to private elementary and secondary schools, would have been applied, in appropriate cases, to other types of schools. For example, the IRS indicated that those guidelines could have been applicable to a college or university that was adjudicated to be discriminatory.

A "reviewable school" is defined as a school (1) which was formed or expanded at the time of public school desegregation in the community served by the school; (2) which does not have a significant minority[3] student enrollment; and (3) whose creation or substantial expansion was related, in fact, to public school desegregation in the community. Under the proposed Revenue Procedure, a school would be treated as reviewable only when all three of the foregoing characteristics exist.[4]

"Community" served by the school is defined to mean the public school district within which the school is located, together with any other public school district from which the school enrolls a substantial percentage of its student body. As an objective factor, the IRS will consider 20 percent a substantial percentage of a school's student body. If a court desegregation order involves the mandatory assignment of students to or from any of such foregoing school districts, community includes all public school districts covered by the order, and the appropriate percentage of minority students will be determined with reference to all such districts.

Under the procedure, a school will be considered formed or substantially expanded at the time of public school desegregation in the community served by the school if the school's formation or expansion takes place during any calendar year any part of which falls within the period beginning one year before implementation of a public school desegregation plan in the community and ending three years after substantial implementation of such desegregation order or plan. On the other hand, the proposed guidelines provide that a school will not be considered to have substantially expanded during a particular calendar year, if the increase in the maximum number of students enrolled in the school at any time during that calendar year is 20 percent[5] or less of the maximum number of students enrolled in the school at any time during the immediately preceding calendar year. If the increase in enrollment is greater than 20 percent, the IRS is required to make a determination whether the expansion is related, in fact, to public school desegregation before treating the school as reviewable.

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[2] The original version of the proposed procedure did not so state.

[3] "Minority" is defined as including Blacks, Hispanics, Asians, or Pacific Islanders, and American Indians or Alaskan Natives.

[4] The original version of the proposed Revenue Procedure generally would have classified a school formed or substantially expanded at the time of public school desegregation as "reviewable" if its percentage of minority enrollment was less than 20 percent of the percentage of school age minorities in the community. These schools would have been required to show, by the existence of at least four out of five specific factors, that their relatively low level of minority enrollment was not due to racially discriminatory policies. These factors were: (1) availability of, and granting of, scholarships or other financial assistance on a significant basis to minority students; (2) active and vigorous minority recruitment programs; (3) an increasing percentage of minority student enrollment; (4) employment of minority teachers or professional staff; and (5) other substantial evidence of good faith.

[5] The original version of the proposed procedure used the figure of 10 percent.

The proposed Revenue Procedure recognizes that the question of whether a particular school's minority enrollment is significant depends on all the relevant facts and circumstances. The procedure provides that consideration will be given to special circumstances that may limit a school's ability to attract minority students. As an example of a special circumstance, the procedure cites a school's emphasis on special programs or special curricula which by their nature are of interest only to identifiable groups that are not composed of a significant number of minority students, provided that such programs or curricula are not offered for the purpose of excluding minorities.

The procedure provides a "safe harbor" for private schools. The IRS will consider a school to have a significant minority enrollment, and therefore, not be reviewable, if the school's percentage of minority students is equal to 20 percent or more of the percentage of the minority school age population in the community served by the school.[6]

In addition, the proposed Revenue Procedure allows certain schools that are part of a system of commonly supervised schools to be considered in the context of the system as a whole. It provides that if a particular school that is part of a system of commonly supervised schools otherwise would be treated as not having significant minority school enrollment (*e.g.*, because it does not meet the 20 percent "safe harbor" test), it may nevertheless be considered to have a significant minority student enrollment if all of the following conditions are met: (1) taking into account all schools operated by the system within the community, the school system, in the aggregate, has significant minority student enrollment; (2) the schools within the community serve designated geographical areas, and the designations are based on considerations other than race; and (3) there is no evidence that the school system operates on a racially discriminatory basis, such as through the operation of a dual school system based on race.

The proposed Revenue Procedure indicates that, as a general rule, the formation or substantial expansion of a private school at the time of public school desegregation in the community ordinarily will be considered to be related in fact to public school desegregation. However, the IRS will consider evidence that a school's formation or substantial expansion was not related in fact to public school desegregation in the community and therefore, that the school is not a reviewable school. The procedure lists seven nonexclusive factors as indicative of the fact that a private school's formation or substantial expansion may not have been related in fact to public school desegregation:

> (1) The students to whom the opening or substantial expansion of the school is attributable are not to any significant extent drawn from the public school grades subject to desegregation in the community served by the school.

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[6] The proposed Reveue Procedure contains the following example: if 50 percent of the school age population in the community is minority, and the school enrolls 200 students, the school would not be reviewable if it had at least 20 minority students. (20 percent × 50 percent=10 percent. 10 percent × 200 students=20 students.)

(2) The rate of expansion is not greater than the rate of expansion experienced by the school in years prior to the time of public school desegregation.

(3) The expansion is attributable to an increase in the school age population in the community.

(4) The expansion results from a merger of the school with another private school and neither of the schools is otherwise "reviewable."

(5) The expansion is attributable to a continuation of previous period expansion by adding grade levels as the school's enrollment in lower grades advances, and the school does not enroll in the newly added grades a significant number of new students from the public schools.

(6) The school was formed or expanded in accordance with a long-standing practice of a religion or religious denomination, which itself is not racially discriminatory, to provide schools for religious education when circumstances are present making it practical to do so (such as a sufficient number of persons of that religious belief in the community to support the school), and such circumstances are not attributable to a purpose of excluding minorities.

(7) At the time of formation or expansion, the school had some minority students, faculty, or board members.

On the other hand, the proposed Revenue Procedure cites the following seven nonexclusive factors as indicative of a private school's formation or substantial expansion being related in fact to public school desegregation in the community:

(1) The opening or substantial expansion of the school occurs in one or more of the same grades subject to public school desegregation.

(2) The students are drawn primarily from the public schools.

(3) The school occupies or utilizes former public school facilities made available to the school in the course of implementation of the public school desegregation plan.

(4) The school is a member of an organization which practices or advocates racial segregation in schools.

(5) The school, or its founders, officers, substantial contributors, or trustees, have engaged in efforts to oppose desegregation of the public schools.

(6) The school, in practice, limits enrollment to students from a geographic area (or areas) with few or no minorities, and this limitation coincides with a public school desegregation plan that involves exchanges of students between such area (or areas) and one or more other areas that have a substantial school age minority population.

(7) Non-minority faculty members added to the school's staff, at the time of its formation or substantial expansion, are drawn primarily from the public school system subject to desegregation.

4. Operative guidelines

The proposed Revenue Procedure provides that, notwithstanding a prior adjudication of racial discrimination as to students, a school that has been adjudicated to be racially discriminatory as to students will be considered to be operated on a nondiscriminatory basis if the school can show that: (1) it currently has significant minority enrollment,[7] or (2) that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis. However, an adjudicated school ordinarily will not be considered to be operated on a racially nondiscriminatory basis unless the school has enrolled some minority students.

Likewise, the proposed procedure provides that, notwithstanding the fact that a school is found to be a reviewable school, the school will be considered to have a racially nondiscriminatory policy as to students if the school can show that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis.

In order to qualify for Federal income tax exemption, the actions or programs which a school undertakes to attract minority students must convey clearly to the affected minority community that, notwithstanding the circumstances of the school's formation or expansion and the absence of a significant number of minority students, the school, in fact, operates on a nondiscriminatory basis and minorities are welcome at the school. The proposed procedure recognizes that an adequate level of actions and programs may vary from school to school and depends on the circumstances of the school, including the level of minority school enrollment. The following factors are cited as examples of actions and programs that may contribute to attracting minority students on a continuing basis:

(1) Active and vigorous minority recruitment programs, such as extensive public advertisements in media designed to reach the minority community, specifically inviting minority applicants; communication to minority groups and minority leaders in the community, inviting minority applicants; personal contacts of prospective minority students; and participation in local, regional, or national programs designed to develop new sources of minority recruitment for the school.

(2) Publicized offers of tuition waivers, scholarships, or other financial assistance, with emphasis on their availability for minority students; or actual grants of such financial assistance to minority students.

(3) Employment of, or substantial efforts to recruit, minority teachers or other professional staff.

(4) Participation with integrated schools in sports, music, and other events or activities.

(5) Special minority-oriented curriculum or orientation programs.

(6) Minority members of the board or other governing body of the school.

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[7] A determination of whether a school has significant minority enrollment will depend on all relevant facts and circumstances. However, the "safe harbor" standards available for avoiding "reviewable" status also will apply to current enrollment of previously adjudicated schools. Thus, an adjudicated school will be considered operated on a nondiscriminatory basis if its minority student enrollment is 20 percent or more of the percentage of minority school age population in the community.

Under the proposed Revenue Procedure, the failure of a school's actions or programs, undertaken to attract minority students, to obtain some minority enrollment within a reasonable period of time will be a factor in determining whether such activities are adequate or are undertaken in good faith.

5. Other provisions

The proposed Revenue Procedure prescribes administrative actions and procedures for handling status reviews. The Internal Revenue Service will propose revocation of exemption for schools adjudicated to be discriminatory and for reviewable schools which do not meet the procedure's guidelines. However, in appropriate cases, the IRS will consider deferring the issuance of a final revocation notice to a school which does not meet the proposed guidelines. A school must request deferral of the revocation and must set forth actions already taken, and to be undertaken, in good faith which demonstrate a racially nondiscriminatory policy.

Favorable rulings or determinations will be issued to schools adjudicated to be discriminatory only if they currently have significant minority enrollment or have undertaken actions or programs reasonably designed to attract minority students. Reviewable schools which have commenced operation will receive favorable rulings or determinations only if they undertake actions or programs reasonably designed to attract minority students. If a school has no record of actual operations, a favorable ruling or determination will be issued only if the school's proposed operations can be described in sufficient detail to permit a determination that the school will not be classified as a reviewable school or, that if reviewable, it would meet the guidelines for actions designed to attract minority students.

6. National Office review

To assure correct and consistent application of the proposed Revenue Procedure, the IRS National Office will review all applications for exemption and all examinations of private elementary and secondary schools.

7. Effective date

In the case of schools adjudicated to be discriminatory, the proposed Revenue Procedure is intended to be effective as of the date of final publication. In the case of reviewable schools, it is intended to be effective for purposes of examinations on and after January 1, 1980.[*]

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[*] In the case of reviewable schools whose applications for exemption are pending on the date of final publication and which do not meet the proposed guidelines, the procedure will be effective as of final publication; however, the IRS, if requested by such a school, will defer any action on its application for exemption until January 1, 1980, in order to give the school an opportunity to demonstrate its compliance with the guidelines.

V. DESCRIPTION OF BILLS

A. S. 103

(Senators Hatch, Byrd of Virginia, Garn, Goldwater, Hayakawa, Helms, Laxalt, McClure, Stevens, Thurmond, Tower, Armstrong, Humphrey, Lugar, Schweiker, and Warner)

This bill would prohibit the Internal Revenue Service from implementing its proposed Revenue Procedure for determining whether certain private schools claiming tax-exempt status operate in a racially discriminatory manner. The prohibition would apply to the final issuance of the original proposed guidelines published in the Federal Register of August 22, 1978, and to the issuance of any other proposed or final regulation, revenue procedure, revenue ruling, or other guidelines setting forth rules which are substantially similar to the rules in the February 22, 1978, procedure.

The effect of the bill would be to leave the examination of private schools for discriminatory operations to be conducted on a case-by- case basis in the usual IRS audit process or in the course of making determinations on applications for recognition of exempt status.

The prohibition would be effective for the period beginning on the date of enactment and ending on December 31, 1980.

B. S. 449

(Senators Hatch, Garn, Stevens, and Young)

This bill would amend section 501 (relating to exemption from tax on corporations, certain trusts, etc.) by adding to the statute a new rule of statutory construction to govern interpretation of subsection (c)(3) (relating to organizations organized and operated exclusively for religious, charitable, etc., purposes). The bill would provide that neither the grant of a tax exemption under section 501(c)(3) nor the allowance of a charitable contribution deduction to a section 501(c)(3) organization may be construed as the provision of Federal assistance. This rule of construction would govern regardless of any other statutory provision or any judicial decision.

The amendment made by the bill would apply to all taxable years.

DESCRIPTION OF S. 990 (SENATOR DECONCINI)

The bill would prohibit the Internal Revenue Service from implementing its proposed Revenue Procedure for determining whether certain private schools claiming tax-exempt status operate in a racially nondiscriminatory manner, until the Congress provides legislative guidelines for such determinations. This prohibition would apply to the final issuance of the original proposed guidelines published in the Federal Register of August 22, 1978, and to the issuance of any other proposed, or final, regulation, revenue procedure, revenue ruling, or other guidelines which set forth rules substantially similar to the rules in the February 22, 1978, procedure.

DESCRIPTION OF S. 995 (SENATORS HELMS, FORD, SCHWEIKER, STEVENS, AND ZORINSKY)

The bill requires the Secretary of the Treasury to seek a declaratory judgment as to whether a private school racially discriminates as to students, prior to taking any action which affects the tax-exempt status of, or deductibility of contributions to, such school. The Secretary may make no finding that a private school has a racially discriminatory policy as to students, unless it is shown, by a clear and convincing preponderance of the evidence, that the school has had a practice of deliberate and intentional racial discrimination. Furthermore, the Secretary may not take any action with respect to the tax-exempt status of a school until the school has exhausted all appeals from the final order of the district court. The action must be brought in the Federal district court for the district in which the school is located. If the school is the prevailing party in a civil action brought by the Secretary under the bill, it may be awarded a judgment of costs and attorney's fees.

In general, the effect of the bill would be to provide that only schools which are adjudicated to be discriminatory by the final action of a Federal court may have their tax-exempt status revoked or denied.

If the school has not adopted and published a policy of nondiscrimination as to students on the basis of race, the Secretary of the Treasury is not required to seek declaratory action, prior to the revocation of a school's tax-exempt status.

The bill provides that the admissions' decisions of religious schools would not be considered racially discriminatory if they limit admissions, or give preferences or priorities, to students who are members of a particular religious organization.

A district court which denies a school's application for exemption, or which revokes an exemption, would be required to retain jurisdiction of the case. Upon a subsequent determination that the school has not had a racially discriminatory policy as to students for a period of not less than a full school year since such denial or revocation became final and does not have a racially discriminatory policy as to students, the court would be required to issue an order to that effect and vitiate its prior decision. Such an order may be appealed by the Secretary.

The provisions of the bill would be effective upon enactment.

VI. ISSUES

A. Standards for Exemption

1. Discrimination

A school must have a racially nondiscriminatory policy as to students in order to qualify as an organization exempt from Federal income tax.[1] The proposed Revenue Procedure sets forth guidelines which the Internal Revenue Service will apply in determining whether certain private schools have racially discriminatory policies as to students and therefore, are not qualified for tax exemption under section 501(c)(3). The guidelines are directed toward two categories of schools: (1) schools "adjudicated to be discriminatory" and (2) "reviewable schools."

Generally, there is little doubt that a school which has been adjudicated to be discriminatory by a Federal or State court of competent jurisdiction or proper Federal or State administrative agency will be considered racially discriminatory and will be denied Federal tax exemption. Because of this, some have argued that the proposed Revenue Procedure should apply only to schools adjudicated to be discriminatory, if it is to apply at all.

Those who oppose limiting the procedure to adjudicated schools note that if the classification of a school as an adjudicated school is intended to depend on adjudications of discrimination in nontax proceedings, the number of schools actually examined for discrimination will depend on nontax considerations and the number of adjudications may be largely a matter of chance. In addition, some believe that the proposed procedure does not go far enough because it limits court or agency findings of discrimination which trigger the loss of tax exemption to "final" court or agency decisions from which no further judicial or administrative appeal can be taken. A school might maintain its tax-exempt status for several years through the process of lengthy appeals. For example, almost nine years passed between the IRS's direct notification to the Prince Edward School Foundation about the nondiscriminatory requirements in 1970 and the district court decision in 1979 holding the school ineligible for tax-exempt status because of its racially discriminatory admissions policy.[2] On the other hand, requiring the finality of a court or agency decision before a school is classified as one "adjudicated to be discriminatory" provides a measure of certainty to that classification. It should be noted that schools claiming exemptions, not just the IRS, may seek adjudications. Under section 7428, a school is entitled to judicial review of any adverse IRS determination of exempt status. A school also may go to court if the IRS fails to act on any application for exemption within 270 days. Even if an adverse IRS determination is upheld, a contributor to the school generally may claim a charitable contribution deduction for contributions of up to $1,000 for the period between IRS publication of the notice of revocation and the final decision of the court.

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[1] See, Revenue Rulings 71-447, 1971-2 C.B. 230 and 75-231, 1975-1 C.B. 158.

[2] *Prince Edward School Foundation* v. *Commissioner*, Civil Action No. 78-1103 (D.D.C.), April 18, 1979. This decision will not be final if plaintiffs appeal.

The proposed Revenue Procedure defines a "reviewable school" as a school (1) which was formed or substantially expanded at the time of public school desegregation in the community served by the school, (2) which does not have significant minority student enrollment, and (3) whose creation or substantial expansion was related in fact to public school desegregation in the community.

Under the proposed procedure, a school will be considered formed or substantially expanded at the time of public school desegregation in the community served by the school if its formation or expansion takes place during any calendar year any part of which falls within the period beginning one year before implementation of a public school desegregation plan in the community and ending three years after substantial implementation of such desegregation order or plan.

A possible objection to this provision is that a private school might be exempt from the Revenue Procedure because implementation of a public school desegregation plan has been delayed in a particular community. On the other hand, a private school located in a community where a public school desegregation plan has not been delayed would not be exempt from the procedure, even assuming all other facts regarding the two schools are similar. If delay in the implementation of public school desegregation plans is a concern, the starting date of the review period could be changed to coincide with the date of the court order or the date of agreement to a voluntary plan of desegregation. Another problem may be the lack of guidelines for determining when "substantial implementation" of public school desegregation has occurred.

In order to be classified as a reviewable school, a school must be one that does not have a significant minority enrollment. In determining whether a school has significant minority enrollment, the IRS will give consideration to specific circumstances which limit a school's ability to attract minority students. However, some may be concerned that a near or total absence of minority students could never be regarded as significant minority enrollment, even with consideration being given to the effects of special programs and special curricula.

In some situations, it might be that no inference of racial discrimination should arise because of the existence of very small, or no, minority enrollment. On the other hand, some believe that the enrollment of very few, or no, minority students is indicative of an intent to discriminate.

The proposed procedure provides for a "safe harbor" so that a school will be considered to have a significant minority enrollment if it has minority students equaling, or exceeding, 20 percent of the percentage of the minority school age population in the community. Some are concerned that this is too liberal a test and would lead to "tokenism" in order to avoid the guidelines. Others contend that this test is too difficult for many private schools and that the percentage should be lower. Still others are concerned that fixing any percentage would lead to a quota system in the private schools and, thus, should be avoided.

The proposed procedure states that the formation or substantial expansion of a school at the time of public school desegregation in the community ordinarily will be considered to be related in fact to public school desegregation. It then lists seven factors tending to indicate that the formation or substantial expansion of a school was not related to public school desegregation and seven factors tending to indicate that the formation or substantial expansion of a school was related to public school desegregation. Some have expressed concern that the fact a school was formed or substantially expanded at the time of public school desegregation in the community may be entirely fortuitous and should be given no weight whatsoever, while others consider that fact clearly indicative of an express intent to discriminate. In addition, concern has been expressed that the procedure is unclear with regard to whether it is the IRS or the school which has the responsibility for gathering the facts necessary to indicate that a school's formation or substantial expansion was not related to public scool desegregation.

Even though a private school may be determined, under the proposed guidelines, to be an adjudicated school or a reviewable school, that determination, in and of itself, does not mean that the tax-exempt status of a private school automatically will be revoked. The proposed procedure allows an adjudicated or reviewable school to avoid revocation of tax-exempt status if it can show that it has undertaken actions or instituted programs reasonably designed to attract minority students, and sets forth examples of such affirmative actions and programs. Some groups have challenged the propriety of some of these examples and have asked whether schools would be expected to undertake all, or most, of these efforts to demonstrate their good faith intentions. Some argue that failure to undertake certain of the designated actions and programs should not support a negative inference where, for example, a school is financially unable to offer scholarships or tuition aid or it would be impractical to expect a school to offer special minority-oriented curricula. On the other hand, others believe that the procedure's examples of affirmative actions and programs are the minimum necessary to establish a racially nondiscriminatory policy.

2. Differences in application of procedure—depending on when school was formed or expanded

Unless a private school has been adjudicated to be discriminatory, the proposed Revenue Procedure will apply only if a private school was formed or substantially expanded at the time of public school desegregation in the community. Some have expressed concern that private schools formed or substantially expanded at the time of public school desegregation in the community are unfairly singled out by the IRS for close scrutiny, while other private schools not so formed or expanded may escape the guidelines even if they have clearly discriminatory admissions' policies. Others believe that if a school has been formed or substantially expanded at the time of public school desegregation, that fact may be indicative of an intent to discriminate and that it is upon those schools that the IRS should focus its attention. Still others note that the time of a school's formation or substanital expansion may be entirely fortuitous and should have no bearing whatsoever in determining whether or not a school discriminates. Moreover, because the proposed guidelines focus on communities that have experienced desegregation, certain areas of the country may receive a disproportionate amount of IRS attention because desegregation has been implemented more formally or more fully in those areas.

B. Administrative and Regulatory Problems

1. Burden of proof

If a school is classified as one "adjudicated to be discriminatory" or "reviewable" under the proposed Revenue Procedure, it is required to show that it has undertaken actions or programs reasonably designed to attract minority students on a continuing basis. The procedure sets forth six examples of actions and programs that may contribute to attracting minority students. These actions and programs must convey to the minority community that the school is in fact operating on a nondiscriminatory basis.

Some believe that the standards set forth in the proposed Revenue Procedure establish an irrebutable presumption against certain schools and, therefore, violate the due process clause of the Fifth Amendment of the Constitution. They contend that the legal and administrative expense of proving a school to be nondiscriminatory would be an impossible burden in many cases and that the costly legal action necessary to prove a school's nondiscrimination could prove excessively expensive. Moreover, some argue that if a private school never has denied admission to a minority applicant, it should not have thrust upon it the burden of proving a racially nondiscriminatory policy.

On the other hand, some believe that the burden of proving that a private school is discriminatory has been placed almost entirely upon the IRS. They argue that, under the proposed procedure, the IRS must not only find an objective prima facie case in order to examine a school but also must find the absence of facts illustrative of the relation of the school's formation or expansion to public school desegregation and the presence of facts illustrative of that relation. Therefore, they think that no school will be reviewable until the IRS first proves conclusively that the school is discriminatory. They note that this is generally the reverse of the process by which the Federal courts determine discrimination.

2. Definitions

As discussed above (under VI. A. *Standards for Exemption*), some have expressed concern as to whether an agency or court decision should be "final" before a school is considered as one adjudicated to be discriminatory. Questions also have been raised as to whether the definition of reviewable schools is too narrow and what should constitute significant minority enrollment.

A definitional problem which has raised some concern is the meaning of the term "community" served by the school for purposes of determining whether a school has significant minority enrollment. For example, it is unclear how the procedure's definition of community would operate with respect to a school which enrolls students from across the nation. Such a school might not enroll 20 percent of its students from any particular school district, thus leading to confusion in the determination of whether that school has significant minority enrollment. This objection might be addressed by providing that when a school does not enroll a substantial percentage of students from any one school district, the term "community" includes all States from which the school enrolls a substantial percentage of its students.

Another problem raised with respect to the definition of community is that two private schools each located in a different public school district with a different racial composition but competing with each other for students, may be treated differently under the proposed procedure, assuming both schools enroll few, or no, minority students. A solution suggested to meet this objection is that the definition of community be changed to include only those school districts from which a substantial percentage of students are enrolled. If that were the case, a school which did not enroll 20 percent of its students from the district in which it is located would not have that district counted for the purpose of measuring whether or not it had significant minority student enrollment. Some might argue, however, that such a change would allow a private school located in a racially-mixed city, which draws substantially all of its students from white suburbs, to avoid the guidelines.

Finally, with respect to the definition of community, some have argued that for religious schools which restrict enrollment to members of a particular faith, community should be defined in terms of the congregation.

The proposed procedure provides that if a particular school which is part of a "system of commonly supervised schools" does not have significant minority student enrollment, it nonetheless may be treated as having a significant minority enrollment if certain conditions are met. It has been pointed out that this provision could allow an entire school system to qualify as nondiscriminatory under the Revenue Procedure even though it may be made up of separate schools, some of which are composed substantially of minority students and others of which are composed substantially of nonminority students. Because of this, some have suggested that the Revenue Procedure be strengthened to assure that separate schools may be considered on a systemwide basis only when their division into separate schools does not involve a racially discriminatory purpose.

Others believe, however, that the provision regarding school systems should not be changed because it recognizes that individual private schools in a system will vary in the racial mix of their student bodies and, therefore, should be judged as members of a system with a common commitment to the active support of a policy of racial nondiscrimination. Nevertheless, that the nature of the term "system" might be clarified.

C. Constitutional Issues

1. Separation of powers

a. General

A fundamental principle of American constitutional law is the concept of separation of powers. The United States Constitution establishes three divisions of governmental powers in the executive, judicial, and legislative branches. This division of power creates a system of checks and balances among the branches to ensure the independence of each branch and to prevent the concentration of power in a single branch.

The separation of powers necessarily imposes restraint on the authority of one branch to interfere with the functioning of another branch. One particular area of concern is the authority of Congress to intervene in the judicial process or to direct the courts to reach certain decisions. Some have argued that once Congress confers jurisdiction upon the courts, it cannot direct that the jurisdiction be exercised in a manner contrary to, or in disregard of, constitutional requirements.

b. Legislative proposals

Proposals to prohibit IRS procedures to determine racial discrimination and to require specific judicial interpretations of government actions (see S. 103 and S. 449) raise constitutional questions regarding the doctrine of separation of powers with respect to the power of Congress and the authority and jurisdiction of the Federal courts.

Congressional prohibition of the implementation by the Internal Revenue Service of any new guidelines or other administrative rules for determining whether private schools claiming tax-exempt status discriminate racially, through S. 103 or similar legislation, might be interpreted as legislative interference with the Federal judiciary because the proposed revenue procedure was formulated in response to an injunction and order issued by a three-judge United States district court. If, as some have argued, the injunction and court order are based on constitutional grounds, a Congressional ban on the issuance of IRS procedures may interfere with IRS compliance with the court order and may constitute an improper intrusion upon the judicial branch's powers. On the other hand, if the court's injunction and order are based on a statutory interpretation of section 501(c)(3), then Congress may possess the power to modify or prohibit IRS guidelines or rules issued under the statute.

If Congress adopts S. 449 or any similar provision directing the Federal courts to find that no state action (for example, no provision of Federal assistance) occurs when tax-exempt status is granted to a private school, or when tax deductions are allowed for contributions to private schools, controversies could ensue with respect to the power of Congress to interfere with the Federal judiciary. Some have argued that a finding of government or state action is an inherent judicial determination and that any attempt by Congress to direct the courts to interpret the provision in a narrow manner would be unconstitutional. Such arguments are premised on the fact that Congress may not dilute the rights of individuals under the due process and equal protection clauses of the Constitution. In this view, legislation directing the courts to find that the grant of a tax exemption to private schools does not constitute state action would dilute the rights of minorities under the Fifth Amendment and, therefore, would be unconstitutional.

2. State Action

a. General

Nearly all of the Constitution's safeguards of individual rights are essentially limitations on governmental action.[1]

Because these safeguards are not restraints on persons acting in a private capacity, a person who alleges damage by reason of allegedly unconstitutional activity must show that there is sufficient governmental action (or state action) to bring the constitutional provisions into play. In some cases, state action is obvious, for example, in the operation of public schools. In other cases, the governmental involvement in the conduct complained of may be less obvious. The Supreme Court has indicated that the issue of whether an activity involves state action depends upon the facts and circumstances of each case. In general, it appears that the concept of what is state action is essentially the same for Federal Government as for State or local government authorities.

b. Special tax treatment as state action

There appears to be little direct authority as to whether tax exemptions, or other specific tax benefits[2] afforded to a private party, constitute state action which involves the government in an activity (such as racial discrimination) of the private party. Although direct aid to discriminatory private schools has been found improper by Federal courts in decisions indicating that such aid is considered state action, it is not clear that indirect aid, the grant of tax exemptions (or the denial of tax exemptions) would be so characterized. Generally, challenges to the provisions of tax benefits to racially discriminatory private schools have been decided on other grounds without reaching the state action issue.

The Supreme Court has discussed the general equation of Federal tax benefits with direct aid only in *dicta*. There is some language in the opinions in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), which would indicate a distinction between tax exemptions and general subsidies. Thus, in the majority opinion, it is pointed out that the abstention from the collection of tax does create a benefit to the organization but will result in less involvement with sustained and detailed administrative relationships for enforcement of statutory or administrative standards than would a governmental grant (397 U.S. at 674–5). It should be noted that the *Walz* case did not involve racial discrimination, and the test for what is an indirect benefit which is prohibited appears to be more stringent in cases involving racial discrimination.[3]

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[1] The first eight amendments to the Constitution (the Bill of Rights) limit the conduct of the Federal Government and, to the extent of their incorporation into the due process clause of the Fourteenth Amendment, also are limitations on State governments.

[2] The Internal Revenue Code and, in some cases, other Federal statutes provide that non profit educational organizations may qualify for several types of favorable treatment. First, such an organization may qualify for tax-exempt status under section 501(a) if it meets the requirements of 501(c)(3) of the Code. Second, such an organization may be eligible to receive contributions for which the donor can receive an income tax deduction under section 170. Also, gifts to such an organization are generally not subject to the estate or gift taxes (secs. 2055, 2106(a)(2) and 2522 of the Code). Third, nonprofit educational institutions are exempt from a number of Federal excise taxes (under sec. 4221(a)(4) of the Code) and from the communications excise tax (under sec. 4253(j) of the Code). Also, employees of organizations described in section 501(c)(3) may take advantage of the special taxation of annuity provisions under section 403(b), and many exempt organizations have the privilege of preferred second or third class mailing rates. See 29 U.S.C. § 4358; 39 C.F.R. parts 132, 134.

In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), the Supreme Court indicated that the distinction between direct grants and special tax provisions was not necessarily determinative and that State laws providing for direct tuition grants and special tax benefits (in the nature of a tuition tax credit) to parents of children attending nonpublic schools were in violation of the Establishment Clause.

c. IRS procedures and state action

Some persons have argued that the grant of tax exemption to a private school does provide substantial aid and constitutes state action. Therefore, because of the constitutional prohibition against race discrimination, they believe that such exemptions must be denied to schools which racially discriminate. Some of these persons support the proposed IRS procedures; others believe stronger administrative action is required.

Other persons object to the Internal Revenue Service's proposed procedure as a restraint on First Amendment rights. They believe that children attending such schools and their parents have First Amendment rights of freedom of association (and freedom of religion) which protect the parents' right to educate their children in a school of the parent's choice. They consider the denial of tax benefits to private schools an unconstitutional abridgement of these rights because the imposition of less favorable tax rules for these organizations would unduly influence or penalize the parents' choice schools.

Arguments of this sort have been rejected by the Supreme Court in cases involving State aid of a direct nature. Thus, in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Supreme Court held that the right of private schools to exist and operate does not include the right of these schools to receive any share in State aid without regard to constitutionally mandated standards forbidding State-supported discrimination. Also, it seems fairly clear that even indirect State aid to racially discriminatory school is prohibited. Thus, in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), the Supreme Court prohibited the nonexclusive use of public parks by racially discriminatory private schools.

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[3] Some lower court cases have considered the provision of certain Federal tax benefits as generally equivalent to direct Federal assistance. *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1970). In *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.D.C. 1972), the court held that the tax exemption for fraternal orders (under which all income other than "unrelated business taxable income" is exempt from tax) and the allowances of an income tax deduction to contributions to these organizations (under sec. 170(c)(4)) constituted state action. However, the court indicated that the tax exemption for social clubs (in effect, limited to income from dealings with members) did not constitute state action. *Cf. Jackson* v. *Statler Foundation*, 496 F. 2d 623 (2d Cir. 1974), cert. denied 420 U.S. 927 (1975) (tax exemption and regulation provisions of Internal Revenue Code may constitute state action).

The Supreme Court does not appear to have spoken directly on the issue of the granting of Federal tax benefits to racially discriminatory organizations, unless its affirmance of *Green* v. *Connally* is treated as adopting the lower court's language. In *Green* v. *Connally*, the district court rejected the claims of the intervening white parents that it would be unconstitutional to deny tax exemption and qualification for tax deductible contributions to racially discriminatory private schools on the basis of earlier Supreme Court rulings. The earlier rulings rejected the First Amendment "right of association" claims which were interposed as objections to court orders ordering the termination of government financial support to segregated private schools.

The weight of authority indicates that there is no constitutional basis for requiring the government to provide tax benefits to racially discriminatory private schools or to donors to such schools.

3. Racial discrimination

a. Court decisions

Racial discrimination in public education was ruled illegal and contrary to public policy in the 1954 Supreme Court decision of *Brown* v. *Board of Education*, 347 U.S. 482 (1954). After that decision, public school systems had little success in evading desegregation orders. Public school desegregation contributed to the creation of private schools and academies with all-white enrollments for the purpose of avoiding desegregation.

Attempts by State and local governments to aid private schools which racially discriminate have been challenged successfully in the courts. The most significant of these cases is *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub. nom. Coit* v. *Green*, 404 U.S. 997 (1971), which involved a class action by black parents of school children attending Mississippi public schools to enjoin United States Treasury officials from according tax-exempt status and from allowing deductions for contributions to private schools in Mississippi discriminating against black students. In *Green*, the Federal District Court in an opinion affirmed by the Supreme Court, held that racially discriminatory private schools are not entitled to Federal tax exemption and persons making gifts to such schools are not entitled to charitable contributions deductions for such gifts. As a matter of constitutional law, the court found that any amount of State support to help fund segregated schools or to help maintain segregated schools is sufficient to give black school children standing to file a complaint in Federal court attacking the constitutionality of such action.[4]

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[4] The court in *Green* stated the "history of state-established segregation in Mississippi, coupled with the founding of new private schools there at times reasonably proximate to public school desegregation litigation, leaves private schools in Mississippi carrying a badge of doubt." The court further stated:

"To obviate any possible confusion, the court is not to be understood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action on behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class."

The *Green* court permanently enjoined the Internal Revenue Service from approving any application for tax-exempt status under section 501(c)(3) of the Code for any private school located in the State of Mississippi unless such private school makes a showing in support of its application for exemption:

> (1) That the school has publicized the fact that it has a racially nondiscriminatory policy as to students, meaning that it admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and further meaning, specifically, but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.
>
> (2) That the school has publicized this policy in a manner that is intended and reasonably effective to bring it to the attention of persons of student age (and their families) who are of minority groups, including all nonwhites.

The court further enjoined the IRS from approving any application for tax-exempt status for any private school located in the State of Mississippi unless such school supplied the IRS with specified information, which the court said was material if the Service was to be in an effective position to determine whether the school has actually established a policy of nondiscrimination. The required information was:

> (1) Racial composition, as of the pending academic year, and projected so far as may be feasible for the subsequent academic year, of student body, applicants for admission, and faculty and administrative staff.
>
> (2) Amount of scholarship and loan funds, if any, awarded to students enrolled or seeking admission, and racial composition of students who have received such awards.
>
> (3) Listing of incorporators, founders, and board members; donors of land or buildings, whether individuals or organizations; and a statement as to whether any of the foregoing have an announced identification as an organization having as a primary objective the maintenance of segregated school education, or have an announced identification as officers or active members of such an organization.

In *Prince Edward School Foundation* v. *Commissioner*, No. 78-1103 (D.D.C.) decided on April 18, 1979, the court followed the *Green* decision and found a school with a racially discriminatory admissions policy is not entitled to Federal tax exemption.

In *Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Supreme Court held unconstitutional a program in which textbooks were purchased by the State and loaned to students in both public and private schools, including private schools that had racially discriminatory policies.

On remand in *Norwood*, 382 F. Supp. 921 (N.D. Miss. 1974), the district court held that a prima facie case of racially discriminatory policies rendering a private school disqualified for receiving textbooks from the State, arises from proof that the school's existence began close upon the heels of massive desegregation of the public schools within its locale and that no blacks are, or have been, employed as teachers or administrators at the school. The court further held that once a prima facie case of a racially discriminatory admissions policy is established, so as to disqualify a school from receiving State aid, the school's officials or representatives bear the burden of rebutting the inference of racial discrimination. The court stated that such rebuttal evidence may not be limited to the mere denial of a purpose to discriminate, but must, in order to be effective, clearly and convincingly reveal objective acts and declarations establishing that the absence of blacks was not proximately caused by the school's policies and practices and show affirmative steps instituted by the school to insure the availability of all of its programs to blacks who choose to participate.

In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the Supreme Court held that a statutory provision, 42 U.S.C.A. sec. 1981, granting all persons the same right to make and enforce contracts, prohibits private, commercially operated, nonsectarian schools from denying admission to blacks and, as so construed, is a permissible exercise of Congress' power to enforce the Thirteenth Amendment.

Recently, in *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), a district court held that a private school is not entitled to exemption from Federal income tax notwithstanding the religious belief on which its racially discriminatory admissions policy rests.[5]

In another recent case involving a school's qualification under section 501(c)(3), however, the court held improper IRS revocation of the exemption of a religious university which would not admit racially mixed couples. *Bob Jones University* v. *U.S.*, No. 76-77[illegible] (D.S.C. December 1978). The decision in this case is being appealed by the government.

b. Criticism of proposed procedure

Although the illegality of granting tax exemption to racially discriminatory private schools generally is acknowledged, the Internal Revenue Service's proposed procedures for reviewing private schools for racial discrimination has been challenged.

It has been suggested that determinations of racial discrimination should be made by the courts, not by the IRS, an administrative agency with limited expertise in civil rights. This approach would restrict IRS denials or revocations of exemptions to schools which have been adjudicated to be racially discriminatory. Some believe that such an approach would cause unnecessary litigation for many cases in which discrimination could be readily determined administratively in significantly less time and at less expense.

Some civil rights spokesmen have criticized the proposed procedure as inadequate for preventing exemptions from being granted to schools which discriminate because of the procedure's limited applicability and its consideration of factors which effectively create exceptions. They note, for example, that schools organized in areas not subject to desegregation plans or established more than a year before the implementation of such a plan would not be reviewable under the procedures and would only be required to fulfill the Service's requirements for publicizing nondiscriminatory policies, which both the Service and courts have recognized as insufficient.

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[5] In so holding, the court asserted the following:

"There is a legitimate secular purpose for denying tax exempt status to schools generally maintaining a racially discriminatory admissions policy. Moreover, the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion. Finally, the policy patently avoids excessive governmental entanglement with and, in fact, prevents indirect government aid to religion."

4. First Amendment considerations

Because many private schools claiming tax exemption are religious or church-affiliated organizations, questions have arisen about the relationship between the proposed IRS procedures and the guarantees of individual rights and the limitations on government action established in the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

a. Establishment Clause

The Establishment Clause of the First Amendment prohibits Federal and State governments from setting up a church, from aiding any or all religions, and from preferring one religion over another. In *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the Supreme Court also held that involvement between church and state can create problems of entanglement which, if excessive, contravenes the Establishment Clause.

Ordinarily, it is the grant of a tax exemption, not its denial, which raises issues under the Establishment Clause about the propriety of such Federal or State aid to a religious institution. Questions about the proposed procedures tend to involve issues of preference for some churches or religions over other churches or religions, and issues of entanglement. The special consideration shown under the guidelines for religious schools organized as part of a system and for religious schools whose specialized pograms would not be attractive to minorities has been criticized as allowing a few religious groups preferential treatment which is not granted to others. These aspects of the guidelines have been defended as reasonable and necessary accommodations of religious and church-related schools which otherwise would be reviewable schools for reasons bearing no relation to racial discrimination. Moreover, by considering these special factors of organization or program in finding a school is not reviewable, the IRS avoids work for both itself and such schools in examinations which would be unnecessary and unfruitful because of the improbability of proving racial discrimination in such circumstances.

Some contend that the proposed procedure should be withdrawn because it entails excessive government intrusion into churches or into religion. Others believe that the procedure reduces such entanglement by providing standards for excepting schools from more intensive examination.

b. Free Exercise Clause

Because of the constitutional protection afforded by the Free Exercise Clause of the First Amendment, the government must eliminate or adapt rules which conflict with the free exercise of religion unless a strong state interest exists for preserving the rule, or unless changing

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the rule to accommodate religious beliefs would result in administrative problems which would frustrate the substantial and relevant government purpose for the rule. Although religious beliefs may not be regulated by government, regulation of acts based on religious beliefs or principles has been upheld by the Supreme Court.[6]

The proposed procedure has been criticized as improperly burdening the free exercise of religion by religious groups or churches who, for racially innocent reasons, have few or no minority members. However, the procedures allow for consideration of factors such as special curricula or low minority membership to except schools from reviewable status, if the factors are not based on segregationist motives. Defenders of the procedures believe that these provisions accommodate religious belief sufficiently to counter any challenges under the Free Exercise Clause.

5. Constitutional conflict: race and religion

The revocation or denial of tax exemptions for religious or church-related private schools which are racially discriminatory may bring two constitutional policies into conflict: the guarantees of the First Amendment religion clauses and the prohibition against racial discrimination particularly with respect to education. In resolving conflicting Constitutional demands, the Federal courts either have tried to balance the policies by weighing or evaluating the competing considerations in the controversies or have recognized one of the constitutional policies as more important than the other. Although judicial precedents require the denial of tax-exemptions to racially discriminatory religious schools, some critics of the proposed guidelines contend that the procedures should be more narrowly drawn, for example, limited to adjudicated schools, in order to accommodate First Amendment considerations. Other critics interpret the judicial opinions as inconconclusive.

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[6] *Reynolds* v. *United States*, 98 U.S 145 (1878) (affirming polygamy conviction over the Mormon defendant's religious objection).